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PART I.—INTRODUCTORY.

SECTION 1.—HISTORY OF FACTORY LEGISLATION.

SUBSECTION (1).—1802 to 1878.

1. The first Factory Act, of 1802,¹ made provision for the cleansing and ventilation of cotton, etc. mills and factories, and for the clothing, hours of labour, and religious education of apprentices in these factories. Between 1819 and 1856 successive Acts, relating only, however, to textile and allied industries, made regulations as to safety, hours, meal times, and holidays of children. Acts passed in 1864 and 1867 included for the first time certain non-textile factories and workshops. By 1875, owing to the *ad hoc* methods employed in remedying defects, resulting in there being nineteen different statutes, the chaos was such that a Royal Commission was appointed, whose Report of 1876 led to the passing of the Factory and Workshop Act, 1878,² which consolidated the existing statutes, with amendments.

SUBSECTION (2).—1878 to 1901.

2. Since 1878 there have been passed the Factory and Workshop Act, 1883;³ the Factory and Workshop Amendment (Scotland) Act, 1888;⁴ the Cotton Cloth Factories Act, 1889;⁵ the Factory and Workshop Act, 1891;⁶ the Factory and Workshop Act, 1895.⁷ The passing of these various statutes again made a consolidating Act necessary. This was the Factory and Workshop Act, 1901,⁸ which, subject to the alterations made by subsequent Acts, is a complete code of the law on the subject.

SUBSECTION (3).—1901 to Present Time.

3. Since the passing of the Act of 1901, some thirteen statutes have been passed, making considerable changes in the law, so that further consolidation is desirable.⁹ Some of these statutes operate by way of amendment of the provisions of the Act of 1901, and will be noticed in Part II. (*infra*). Others, which deal with matters not directly within the scope of the Act of 1901, will be dealt with in Part III. (*infra*).

¹ 42 Geo. III. c. 73.³ 46 & 47 Vict. c. 53.⁵ 52 & 53 Vict. c. 62.⁷ 58 & 59 Vict. c. 37.² 41 Vict. c. 16.⁴ 51 & 52 Vict. c. 22.⁶ 54 & 55 Vict. c. 75.⁸ 1 Edw. VII. c. 22.

⁹ A consolidating and amending Bill is in draft, the principal features of which are: (1) the abolition of distinctions between different kinds of factories and workshops; (2) extensive alterations regarding hours of employment of women, etc.; (3) more stringent health and safety regulations; and (4) greater powers to the Home Secretary to alter the law by issuing orders.

SECTION 2.—STATUTES AT PRESENT IN FORCE.

4. The statutes affecting factories and workshops which are at present wholly or partly in force in Scotland, including some of date prior to 1901, are as follows: Quarries Act, 1894;¹ Public Health (Scotland) Act, 1897;² Factory and Workshop Act, 1901;³ Employment of Children Act, 1903;⁴ Census of Production Act, 1906;⁵ Notice of Accidents Act, 1906;⁶ Factory and Workshop Act, 1907;⁷ White Phosphorus Matches Prohibition Act, 1908;⁸ Factory and Workshop (Cotton Cloth Factories) Act, 1911;⁹ Police, Factories, etc. (Miscellaneous Provisions) Act, 1916;¹⁰ Education (Scotland) Act, 1918;¹¹ Scottish Board of Health Act, 1919;¹² Women and Young Persons (Employment in Lead Processes) Act, 1920;¹³ Employment of Women, Young Persons, and Children Act, 1920;¹⁴ Workmen's Compensation Act, 1923;¹⁵ Lead Paint (Protection against Poisoning) Act, 1926.¹⁶

SECTION 3.—PREMISES AFFECTED BY THE STATUTES.¹⁷

SUBSECTION (1).—*Factories*.¹⁸

5. "Factory" means textile factory or non-textile factory. "Textile factory" means any premises wherein, or within the close or curtilage of which steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately, or mixed together or mixed with, any other material, or any fabric made thereof. Print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works are expressly excepted. They may be either non-textile factories or workshops.

6. "Non-textile factory" means (a) any of the following works, warehouses, furnaces, mills, foundries, or places: ¹⁹ print works ²⁰ (printing on fabrics, not paper), bleaching or dyeing works, ²¹ earthenware works,

¹ 57 & 58 Vict. c. 42.

³ 1 Edw. VII. c. 22.

⁵ 6 Edw. VII. c. 49, s. 10.

⁷ 7 Edw. VII. c. 39.

⁹ 1 & 2 Geo. V. c. 21.

¹¹ 8 & 9 Geo. V. c. 48, s. 17. This section has not yet been put into operation.

¹² 9 & 10 Geo. V. c. 20, s. 4 (2) (c). Powers of Home Secretary under ss. 61, 97–100, 109, 110 of Act of 1901 transferred to Scottish Board of Health (S.R. & O. 1921, No. 1011, p. 296).

¹³ 10 & 11 Geo. V. c. 62.

¹⁵ 13 & 14 Geo. V. c. 42, ss. 28 & 29.

¹⁷ See note 9, p. 4, *supra*.

¹⁹ Named and further defined by reference to the processes carried on, in Sixth Schedule, Part. I.

²⁰ *Hardcastle v. Jones*, 1862, 3 B. & S. 153.

²¹ *Howarth v. Coles*, 1862, 12 C.B. (N.S.) 139; *Rogers v. Manchester Packing Co.*, [1898] 1 Q.B. 344.

² 60 & 61 Vict. c. 38, ss. 16 and 29.

⁴ 3 Edw. VII. c. 45.

⁶ 6 Edw. VII. c. 53, ss. 4 and 5.

⁸ 8 Edw. VII. c. 42.

¹⁰ 6 & 7 Geo. V. c. 31, ss. 7 and 8.

¹⁴ 10 & 11 Geo. V. c. 65.

¹⁶ 16 & 17 Geo. V. c. 37.

¹⁸ 1901 Act, s. 149 (1).

lucifer-match works, percussion-cap works, cartridge works, paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills, foundries, metal and india-rubber works, paper mills,¹ glass works, tobacco factories, letterpress printing works, book-binding works, flax scutch mills, electrical stations;² (b) any of the following premises or places wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there, viz.: hat works, rope works,³ bake-houses,⁴ lace warehouses, shipbuilding yards,⁵ quarries,⁶ pitbanks (above ground and so far as not regulated by Mines Acts), dry-cleaning, carpet-beating, and bottle-washing works;⁷ (c) any premises wherein or within the close, etc. of which any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes, viz.: the making of any article or part of any article; the altering, repairing, ornamenting, or finishing of any article; the adapting for sale of any article; and wherein etc. steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

SUBSECTION (2).—*Tenement Factories.*⁸

7. "Tenement factory" means a factory where mechanical power is supplied (from the same source)⁹ to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories. For the purpose of the provisions relating to tenement factories, all buildings situate within the same close or curtilage are treated as one building.

SUBSECTION (3).—*Workshops.*¹⁰

8. "Workshop" means (a) any hat works, rope works, bakehouse, lace warehouse, shipbuilding yard, quarry, pitbank, dry-cleaning works, carpet-beating works, or bottle-washing works, which is not a factory;¹¹ (b) any premises, room, or place, not being a factory, in which, or within the close, etc. of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, viz.: the making of any article or part thereof; the altering,

¹ *Coles v. Dickenson*, 1864, 16 C.B. (N.S.) 604.

² *Mile End Guardians v. Hoare*, [1903] 2 K.B. 483.

³ If spinning of the yarn is carried on, then it is a textile factory.

⁴ For special regulations see ss. 97–102, and paras. 115 *et seq.*, *infra*.

⁵ Not including a dock, though repairs are being done—*Spencer v. Livett*, [1900] 1 Q.B. 498.

⁶ For special modifications see Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 3.

⁷ Cellars where bottle-washing is incidental to storage are not such—*Kavanagh v. Caledonian Rly. Co.*, 1903, 5 F. 1128.

⁸ 1901 Act, s. 149 (1).

⁹ *Toller v. Spiers & Pond, Ltd.*, [1903] 1 Ch. 362; *Brass v. London County Council* [1904] 2 K.B. 336.

¹⁰ 1901 Act, s. 149 (1).

¹¹ See Sixth Schedule, Part. II.

repairing, ornamenting, finishing, or adapting for sale, of any article, and to or over which premises, etc. the employer has the right of access or control. "Workshop" includes a tenement workshop.

9. "Men's workshops"¹ are workshops conducted on the system of not employing any woman, young person (fourteen to eighteen), or child (under fourteen) therein. The undernoted portions of the Act² do not apply to such workshops. They cannot be applied to men's workshops by Special Order of the Home Secretary.³ "Women's workshops" are workshops conducted on the system of not employing therein either children or young persons, where the occupier has served on an inspector notice of his intention so to conduct his workshop, and until notice of change of intention is so served, without which notice children or young persons may not be employed. Changes may not be made oftener than once a quarter, except for special cause allowed in writing by an inspector.⁴

SUBSECTION (4).—*Tenement Workshops*.⁵

10. "Tenement workshop" means any workplace in which, with the permission of or under agreement with the owner or occupier, two or more persons carry on any work which would constitute the workplace a workshop if the persons working therein were in the employment of the owner or occupier.

SUBSECTION (5).—*Domestic Factories and Domestic Workshops*.⁶

11. These mean a private house, room, or place, which, though used as a dwelling, is, by reason of the work carried on there, a factory or workshop, and in which (a) steam, water, or mechanical power is not used in aid of the process carried on; and (b) the only persons employed are members of the same family dwelling there.⁷

SUBSECTION (6).—*Judicial Interpretations of General Terms*.

12. "Other mechanical power" is *ejusdem generis* with steam or water, and does not include hand power.⁸ "Manufacturing process" does not mean actual production of an article, but includes such processes as cleaning.⁹ "In aid of a manufacturing process" has given

¹ 1901 Act, s. 157.

² *Ibid.*, Part I. ss. 6-9, 16, 17, 21; Parts II. and III. (Employment and Education); Part IV. (Fans, Lavatories, Meals), ss. 74, 75, 78; Part VII. (Particulars of Work and Wages); Part VIII. (Abstracts, Notices, Registers, etc.), ss. 128-130.

³ *Seal v. Alexander*, [1912] 1 K.B. 469.

⁴ 1901 Act, s. 29.

⁵ Sec. 149 (1).

⁶ *Ibid.*, Part VI. (Home Work).

⁷ Sec. 115; but see s. 114 for exceptions (para. 130, *infra*).

⁸ *Wilmott v. Paton*, [1902] 1 K.B. 237.

⁹ *Owner v. Cottingham Sanitary Steam Laundry Co., Ltd.*, 1910, 102 L.T. 571; *Johnston v. Lalonde Bros. & Parham*, [1912] 3 K.B. 218; *Royal Masonic Institution for Boys v. Parker*, [1912] 3 K.B. 212; cf. *Paterson v. Hunt*, 1909, 101 L.T. 571.

rise to somewhat fine distinctions.¹ “*Manual labour*” may have a wider meaning than under the Employers and Workmen Act, 1875, where it means the workman’s real and substantial employment.² But manual labour in schools by way of instruction in any art or handicraft is excepted.³ “*By way of trade, or for purposes of gain*”—an hotel laundry,⁴ a farm engine to grind meal for home consumption,⁵ and a room for repairing nets used in the occupier’s own fishing boats⁶ were held not to be so used. “*Repairing*”—a shed from which parts of tramcars were taken to an adjoining machine room for repair, and in which they were refixed was held a factory for repairing cars.⁷ “*Adapting for Sale*” has been held to include separating saleable from unsaleable refuse,⁸ packing sweetmeats in ornamental boxes,⁹ and making up flowers into wreaths,² but not bottling beer.¹⁰

SUBSECTION (7).—*Extent of Factory, etc. Premises.*

13. A part of a factory or workshop may, with the consent in writing of the chief inspector, be deemed a separate factory or workshop.¹¹ A room solely used for sleeping is not part of the factory or workshop.¹² Where a place within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, it does not form part of the factory or workshop, but if it would otherwise be one, it is deemed to be a separate one.¹³ Two or more buildings entirely separate from each other may constitute one factory.¹⁴ The mere fact that the place or premises is in the open air does not exclude it from the definition of factory or workshop.¹⁵ But there must be a factory or workshop, and an agricultural engine and threshing machine on a road, although about to be used for adapting grain for sale, are not a factory.¹⁶ With the exceptions above noted, every part of the

¹ Contrast *Petrie v. Weir*, 1900, 2 F. 1041, and *Doswell v. Cowell*, 1906, 22 T.L.R. 628, with *Law v. Graham*, [1901] 2 K.B. 327; *Murphy v. O'Donnell*, 1905, 54 W.R. 149, and *James Keith, Ltd. v. Kirkwood*, 1914, 7 Adam 472.

² *Hoare v. Robert Green, Ltd.*, [1907] 2 K.B. 315.

³ 1901 Act, s. 149 (6).

⁴ *Caledonian Rly. Co. v. Paterson*, 1898, 2 Adam 620; but see para. 121, *infra*.

⁵ *Nash v. Hollinshed*, [1901] 1 Q.B. 700.

⁶ *Curtis v. Skinner*, 1906, 22 T.L.R. 448; cf. *Mooney v. Edinburgh, etc. Tramways Ltd.*, 1901, 4 F. 390.

⁷ *Mooney v. Edinburgh, etc. Tramways Ltd.*, *supra*.

⁸ *Henderson v. Glasgow Corporation*, 1900, 2 F. 1127; cf. *Paterson v. Hunt*, 1909, 101 L.T. 571.

⁹ *Fullers, Ltd. v. Squire*, [1901] 2 K.B. 209.

¹⁰ *James Keith, Ltd. v. Kirkwood*, *supra*; but see *Law v. Graham*, *supra*, and *Hoare v. Trueman, Hanbury, Buxton & Co.*, 1902, 86 L.T. 417.

¹¹ 1901 Act, s. 149 (2).

¹² Sec. 149 (3).

¹³ Sec. 149 (4).

¹⁴ *Hoyle v. Oram*, 1862, 12 C.B. (N.S.) 124; *In re London County Council and Tubbs*, 1903, 68 J.P. 29.

¹⁵ 1901 Act, s. 149 (5).

¹⁶ *George v. Macdonald*, 1901, 4 F. 190.

premises is part of the factory, even if power is only used in one part.¹ The Secretary of State has power, by Special Order, to treat different branches or departments of work in the same factory or workshop as different factories or workshops.² This has been done in a few cases, under conditions as to separate rooms, management, personnel, notices, etc.³

14. A "place within the precincts of" a factory does not mean any spot within the factory, but a place outside the factory itself, and separated from it by some appreciable demarcation.⁴ The usual rule is that walls, fences, etc. fix the precincts.⁵ A gas main belonging to a gas company laid under a road a quarter of a mile from their gas-works was held not a factory.⁶ An electrical station erected to supply a dock, but 150 yards from it, was held not part of the dock.⁷

SUBSECTION (8).—*Crown Factories.*⁸

15. The principal Act applies to Crown factories and workshops, even if not carried on by way of trade or for purposes of gain, but in case of public emergency the Home Secretary may issue exemption orders either for a Crown factory or workshop, or for work on a Crown contract specified in the order in any factory or workshop. In the case of Crown factories or workshops the powers of local authorities under the Act are to be exercised by a factory inspector.

SUBSECTION (9).—*Special Types of Premises.*

16. Tenement factories, cotton cloth and other humid factories, bakehouses, laundries, docks, etc., certain buildings under construction, private railway lines and sidings, were the subject of special modifications and extensions under the principal Act.⁹ These, as amended by subsequent legislation, will be dealt with under Part II. (*infra*). Places used by outworkers (*i.e.* home workers), including domestic factories and domestic workshops, are the subject of special regulations,¹⁰ and will be noticed under Part II.

SECTION 4.—WORKPEOPLE AFFECTED BY THE STATUTES.

17. Factory legislation is primarily designed for the protection of workpeople, but workers as well as occupiers of factories have duties

¹ *Taylor v. Hickes*, 1862, 12 C.B. (N.S.) 152; *Hardcastle v. Jones*, 1862, 3 B. & S. 153; *Palmer's Shipbuilding Co. v. Chaytor*, 1869, L.R. 4 Q.B. 209; but see *Vines v. Inglis*, 1915, 7 Adam 561.

² 1901 Act, s. 151. Distinguish from s. 149 (4).

³ See Redgrave's *Factory Acts*, 13th ed., pp. 216–220.

⁴ *Lewis v. Gilbertson & Co., Ltd.*, 1904, 91 L.T. 377; cf. *Vines v. Inglis*, *supra*.

⁵ *Back v. Dick Kerr & Co., Ltd.*, [1906] A.C. 325.

⁶ *Spacey v. Dowlais Gas and Coke Co., Ltd.*, [1905] 2 K.B. 879.

⁷ *Rimmer v. Premier Gas Engine Co., Ltd.*, 1907, 23 T.L.R. 610.

⁸ 1901 Act, sec. 150.

⁹ *Ibid.*, Part V.

¹⁰ *Ibid.*, Part VI.

laid upon them, and may be liable to prosecutions. Men are the least protected class, and, speaking generally, the only parts of the principal Act which apply to them are those relating to health and safety, and laying down special regulations in dangerous and unhealthy industries. Women and young persons (fourteen to eighteen) have the benefit, in addition, of the part relating to hours and other conditions of employment. Children (under fourteen) are protected under these parts by more stringent regulations, and in addition are subject to special care in the matter of education.¹

18. A woman, young person [or child¹] who works in a factory or workshop, whether for wages or not, either in a manufacturing process or handicraft, or in cleaning any part of the factory or workshop used for any manufacturing process or handicraft, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or handicraft or connected with the article made or otherwise the subject of the manufacturing process or handicraft therein, is, except as otherwise provided, deemed to be employed therein.² An apprentice is deemed to work for hire.³

19. The Act does not extend to mechanics, artisans, or labourers working only in repairing either the machinery in, or any part of, a factory or workshop.⁴ There are conflicting decisions in Scotland and England regarding work done in a factory without the owner's or occupier's knowledge or consent.⁵

PART II.—REGULATIONS OF 1901 ACT, AS AMENDED BY SUBSEQUENT LEGISLATION.

SECTION 1.—HEALTH AND SAFETY.

SUBSECTION (1).—*Cleanliness and Sanitation Generally.*

(i) *Factories.*

20. Every factory, as defined by the Act (not including a domestic factory),⁶ must be kept in a cleanly state, and free from effluvia arising from any drain, water-closet, earth-closet, privy, urinal, or other nuisance.⁷ The Public Health Acts do not apply, in these matters, to such a factory.⁸ It must not be overcrowded while work is going on so as to be dangerous or injurious to the health of employees, and it must be ventilated so as to render harmless, so far as practicable, injurious gases, vapours,

¹ By the Employment of Women, Young Persons, and Children Act, 1920 (10 & 11 Geo. V. c. 65), a child may no longer be employed in any industrial undertaking.

² 1901 Act, s. 152 (1). See *Thomas Walker, Ltd. v. Martindale*, 1916, 32 T.L.R. 447; *Graves v. Duncan*, 1899, 2 Adam 711.

³ 1901 Act, s. 152 (2).

⁴ Sec. 158.

⁵ Cf. *Robinson v. Melville*, 1890, 2 White 511, and *Paterson v. Duke*, 1904, 4 Adam 390, with *Prior v. Slaithwaite Spinning Co.*, [1898] 1 Q.B. 881.

⁶ See para. 11, *supra*.

⁷ 1901 Act, s. 1 (1) (a), (b).

⁸ Sec. 1 (2).

dust, or other impurities generated in the manufacturing process or handicraft.¹ All inside walls and ceilings of rooms, and all passages and staircases must be limewashed once every fourteen months (bake-houses, six months).² But where they have been painted with oil or varnished within seven years, they need only be washed with hot water and soap every fourteen months (or six for bakehouses).³ The Home Secretary may, by Special Order, grant to any class of factories or parts thereof, a special exemption from these requirements.⁴

(ii) *Workplaces other than "Factories."*

21. Other factories, workshops, and workplaces⁵ are to be regulated by the Public Health (Scotland) Act, 1897,⁶ and must be kept free from effluvia as above.⁷ When, on certificate of a medical officer of health or sanitary inspector, limewashing, cleansing, or purifying of a workshop, or part, is necessary, the local authority shall notify the owner or occupier⁸ to have such work carried out, and if he fail to do so within the time specified he is liable to a fine of ten shillings per day, and the local authority may do the work and recover the cost.⁹

22. In case of default by a local authority in its duty either under the Act, or under the Public Health Act, the Home Secretary may, by order, authorise a factory inspector to take steps for enforcement, and a factory inspector so authorised has both the powers under the Factory Act, and the powers of the local authority, for such enforcement, and may recover from the local authority such expenses as he does not recover from any other person.¹⁰

23. When it appears to a factory inspector that any act or neglect in relation to any drain, etc. is punishable or remediable under the Public Health Acts, but not under the Factory Acts, he shall give written notice of it to the local authority concerned, who must make inquiry and take action, as they think proper, for enforcement and inform the inspector of the proceedings taken.¹¹ For this purpose the inspector may take with him into a factory or workshop a medical officer of health, sanitary inspector, or other officer of the local authority.¹² If after such notice the local authority does not take proceedings within one month, the factory inspector may take the like proceedings, and may recover the unpaid balances of his expenses from the local authority.¹³

¹ 1901 Act, s. 1 (1) (c), (d).

² Sec. 99 (1) (a). There are special regulations for cotton cloth factories (see para. 113, *infra*).

³ Sec. 1 (3).

⁴ Sec. 1 (4). See S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 1; S.R. & O. 1911, No. 616, p. 53; S.R. & O. 1912, No. 404, p. 147.

⁵ A stableyard may be a workplace—*Bennett v. Harding*, [1900] 2 Q.B. 397.

⁶ 1901 Act, ss. 2, 159 (17); P.H. Act, ss. 16, 29, 183–187 (bye-laws).

⁷ Sec. 2 (2).

⁸ Under s. 1 the occupier only (unless of a tenement factory) is liable.

⁹ Sec. 2 (3), (4).

¹¹ Sec. 5 (1).

¹² Sec. 5 (2).

¹⁰ Sec. 4.

¹³ Sec. 5 (3).

In England the duty of the local authority is enforceable by *mandamus*.¹ In Scotland a petition may be presented to the Court of Session under which the Court may order performance of a statutory duty.²

SUBSECTION (2).—*Overcrowding.*

24. The standard as regards overcrowding, both for the purposes of the Factory Act and the Public Health Act,³ is that there must be at least 250 cubic feet of space in a room for each person employed therein, or during overtime 400 cubic feet.⁴ The Home Secretary, by Special Order, may modify this proportion for any period during which artificial light, other than electric light, is employed for illuminating purposes, and may substitute higher figures as regards any particular manufacturing process or handicraft,⁵ and as regards a workshop or workplace, not being a domestic workshop, occupied by day as a workshop and by night as a sleeping apartment.⁶ A notice must be affixed in every factory and workshop specifying the number of persons who may be employed in each room.

SUBSECTION (3).—*Temperature.*

25. Measures must be taken for securing and maintaining a reasonable temperature in each room in which any person is employed, but so as not to interfere with the purity of the air.⁷ The Home Secretary may, by Special Order, direct that thermometers be provided, maintained, and kept in working order, in specified places and positions.⁸ The section does not apply to men's workshops.⁹ As to laundries, there are additional special provisions as to fans, etc.¹⁰ It is doubtful how far the section applies to domestic factories or workshops.¹¹ "Reasonable temperature" is a question of fact, depending on the season of the year and the work carried on.¹²

SUBSECTION (4).—*Ventilation.*

26. In every room sufficient ventilation must be provided and maintained, and the Home Secretary may, by Special Order, prescribe a standard to be observed in any class of factories and workshops.¹³ Such order may supersede any provision of the Act, or any order,

¹ *R. v. Stepney Corporation*, [1902] 1 K.B. 317.

² MacLaren, Court of Session Practice, p. 99; Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 91.

³ Public Health (Scotland) Act, 1897, s. 16 (8) (iii).

⁴ 1901 Act, s. 3 (1); S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 31.

⁵ 1901 Act, s. 3 (2). Increased for certain bakehouses; S.R. & O. Rev., 1901, iv. Factory and Workshop, p. 4.

⁶ 1901 Act, s. 3 (3). Proportion fixed at 400 cubic feet; S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 4.

⁷ 1901 Act, s. 6 (1).

⁸ Sec. 6 (2); no orders issued.

⁹ Sec. 157.

¹⁰ F. & W. Act, 1907 (7 Edw. VII. c. 39), s. 3.

¹¹ 1901 Act, s. 111 (4) (2).

¹² *Deane v. Barnes*, 1901, 65 J.P. 235; *Peter Robinson, Ltd. v. Plowden*, 1903, 67 J.P. 152.

¹³ Humid textile factories other than cotton cloth factories; see S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 4.

relating to ventilation in cotton cloth factories.¹ A factory is not "kept in conformity" with the Act where there is a contravention of the section, and a workshop where there is a contravention is a nuisance liable to be dealt with under the Public Health Act.² The section does not apply to domestic factories or workshops,³ or to men's workshops,⁴ and laundries have additional special provisions.⁵ If the occupier of a factory or workshop (including a cotton cloth factory in which humidity is artificially produced) alleges that the whole or part of the expense of providing the required ventilation ought to be borne by the owner, he may apply by complaint to a Court of summary jurisdiction, which may order payment or apportionment of the expense, regard being had to the terms of any contract between the parties.⁶ It would appear that, at least where such expenses are not mentioned in the terms of tenancy, the Court is not bound by the terms of the contract.⁷

SUBSECTION (5).—*Drainage of Floors.*

27. In every factory or workshop or part thereof in which any process is carried on which renders the floor liable to be wet to such an extent that the wet is capable of being removed by drainage, adequate means must be provided for draining off the wet.⁸ Contravention in a factory involves "not kept in conformity,"⁹ and in a workshop, "nuisance."¹⁰ The section does not apply to domestic factories or workshops,¹¹ or to men's workshops.¹² There is additional special provision for laundries.¹³

SUBSECTION (6).—*Sanitary Conveniences.*

28. There must be sufficient and suitable accommodation (prescribed by the Home Secretary, and not left to the Court to decide)¹⁴ in the way of sanitary conveniences, having regard to the number of persons employed or in attendance, and to the separate accommodation of sexes.¹⁵ Standards have been prescribed by a Special Order applicable to factories and workshops generally.¹⁶

SUBSECTION (7).—*Fencing of Machinery.*¹⁷

29. In a factory every hoist or teagle (whether connected with mechanical power or not,¹⁸ and including not merely the machinery for

¹ 1901 Act, s. 7 (1), (2).

² Sec. 7 (3).

³ Sec. 111 (4) (e).

⁴ Sec. 157.

⁵ 7 Edw. VII. c. 39, s. 3; see paras. 121 *et seq.*, *infra*.

⁶ 1901 Act, s. 7 (4); cf. ss. 14 (4) and 101 (8).

⁷ *Monk v. Arnold*, [1902] 1 K.B. 761; *Goldstein v. Hollingsworth*, [1904] 2 K.B. 578; *Morris v. Beal*, [1904] 2 K.B. 583; *Horner v. Franklin*, [1905] 1 K.B. 479; *Stuckey v. Hooke*, [1906] 2 K.B. 20.

⁸ 1901 Act, s. 8 (1).

⁹ See para. 168, *infra*.

¹⁰ 1901 Act, s. 8 (2).

¹¹ Sec. 111 (4) (e).

¹² Sec. 157.

¹³ 7 Edw. VII. c. 39, s. 3 (c).

¹⁴ 1901 Act, s. 9 (2); *Tracey v. Pretty & Sons*, [1901] 1 Q.B. 444.

¹⁵ 1901 Act, s. 9 (1).

¹⁶ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 5.

¹⁷ See 1901 Act, s. 149 (4); *Lewis v. Gilbertson & Co., Ltd.*, 1904, 91 L.T. 377.

¹⁸ *Jackson v. A. G. Mulliner Motor Body Co., Ltd.*, [1911] 1 K.B. 546.

operating, but also the hatchway),¹ and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine-house or not, and every part of any water-wheel or engine worked by any such power, must be securely fenced.² Every wheel-race not otherwise secured must be securely fenced close to the edge of the wheel-race.³ "Securely fenced" means fenced according to the best method known at the time, whether usual in the best-regulated factories in the district or not.⁴ If only safe when the machine is working forward, there is an offence whenever the machinery is in reverse.⁵ Even where fencing renders a machine of no commercial utility and more dangerous than when unfenced, it must be fenced.⁶

30. All dangerous parts of the machinery, and every part of the mill gearing, must either be securely fenced or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced.⁷ "Machinery" includes any driving strap or band, and "mill gearing" comprehends every shaft whether upright, oblique, or horizontal, and every wheel, drum, or pulley or other appliance by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process,⁸ including every wheel which aids in the manufacturing process, except the operative wheel.⁹ Dangerous machinery is that from which, in the ordinary course of working, danger may reasonably be anticipated, allowing for carelessness or external causes.¹⁰ The mere fact of an accident having occurred, however, does not imply that it ought reasonably to have been anticipated, and statistics showing absence of accidents may prove the contrary.¹¹ It was held in one case that a wood lathe, which is not usually fenced, ought to have been fenced while used for truing a pendulum saw.¹²

31. The alternative to secure fencing—being "in such position or of such construction as to be equally safe to every person," etc.—is difficult to construe, and it would seem, according to decided cases, that it is not satisfied unless it is impossible for an accident to happen. It is not enough that an accident could not happen without gross recklessness on the part of the person injured.¹³

32. All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except when they are under repair or under examination in connection with repair,

¹ *Duncan v. Scottish Tube Co., Ltd.* (O.H.), 1923, S.L.T. 717. ² 1901 Act, s. 10 (1) (a).

³ Sec. 10 (1) (b).

⁴ *Schofield v. Schunk*, 1855, 24 L.T. 253.

⁵ *Pursell v. Clement Talbot, Ltd.*, 1914, 111 L.T. 827 (C.A.).

⁶ *Davies v. Thomas Owen & Co., Ltd.*, [1919] 2 K.B. 39, per Salter J. at p. 41.

⁷ 1901 Act, s. 10 (1) (c).

⁸ Sec. 156.

⁹ *Holmes v. Clarke*, 1861, 6 H. & N. 349; 1862, 7 H. & N. 937.

¹⁰ *Hindle v. Birtwhistle*, [1897] 1 Q.B. 192; *Fotheringham v. Babcock & Wilcox, Ltd.*, 1922, J.C. 60.

¹¹ *Reid v. British Basket Co., Ltd.* (O.H.), 1913, 2 S.L.T. 201; *Lauder v. Barr & Stroud, Ltd.*, 1927, J.C. 21.

¹² *Stewart & Co. v. London and Midland Insurance Co., Ltd.* (O.H.) 1916, 2 S.L.T. 189.

¹³ *Atkinson v. London and North-Eastern Rly. Co.*, [1926] 1 K.B. 313.

or are necessarily exposed for the purpose of cleaning or lubricating or for altering the gearing or arrangements of the parts of the machine.¹ Even when under repair, the machinery must be kept reasonably safe in the circumstances.² It is no defence that proper guards have been provided and the responsibility of using them put upon the workmen, by notice or other warning. Neglect to observe the provisions of the section does not require any element of wilfulness, and an occupier is liable for mere non-observance,³ unless he brings the actual offender before the Court.⁴ The fact that a workman has removed fencing which has been duly fixed does not affect the absolute statutory obligation.⁵

SUBSECTION (8).—*Steam Boilers.*

33. A steam boiler used for generating steam in a factory or workshop, whether separate or one of a range, must have attached to it a proper safety-valve, steam-gauge, and water-gauge. It must be examined thoroughly by a competent person at least once in every fourteen months.⁶ Every boiler, safety-valve, steam-gauge, and water-gauge must be maintained in proper condition.⁷ A report, signed by the person making an examination, of the result of every such examination in the prescribed form shall be entered, within fourteen days, into or attached to the general register of the factory or workshop. If the person making the examination is an inspector of a boiler-inspecting company or association the report shall be signed by the chief engineer of the company or association.⁸ Boilers of locomotives belonging to and used exclusively by railway companies, and boilers belonging to or exclusively used in the service of His Majesty do not come under this section.⁹ For the purposes of the section the whole of a tenement factory or workshop shall be deemed to be one factory or workshop, and the owner shall be substituted for the occupier, and he shall register the necessary report.¹⁰ The words "owner substituted for occupier" are presumably intended to apply only in the case of tenement factories.

SUBSECTION (9).—*Self-acting Machines.*

34. In every factory erected after 1st January 1896 the traversing carriage of any self-acting machine must not be allowed to run out within a distance of eighteen inches from any fixed structure, not being part of the machine, if the space over which it runs is a space over which any person is liable to pass, whether in the course of his employment or otherwise, but any portion of the traversing carriage of any self-acting cotton-spinning or woollen-spinning machine may be allowed

¹ 1901 Act, s. 10 (1) (d).

² *Murray v. Bernard & Co.* (O.H.), 1897, 5 S.L.T. 101; *Scott v. Brookfield Linen Co., Ltd.*, [1910] 2 Ir.R. 509.

³ *Thomas v. Thomas Bolton & Sons, Ltd.*, 1928, 44 T.L.R. 640.

⁴ See 1901 Act, s. 141.

⁵ *Mooney v. John Glen & Sons* (O.H.), 1913, 2 S.L.T. 322.

⁶ 1901 Act, s. 11 (1).

⁷ Sec. 11 (2).

⁸ Sec. 11 (3).

⁹ Sec. 11 (5).

¹⁰ Sec. 11 (6).

to run out within a distance of twelve inches from any part of the head-stock of another self-acting cotton-spinning or woollen-spinning machine.¹ A person employed in a factory must not be allowed to be in the space between the fixed and the traversing parts of a self-acting machine, unless the machine is stopped on the outward run, but the space in front of the machine is not included.² A woman, young person [or child³] must not be allowed to work between the fixed and traversing parts of any self-acting machine while the machine is in motion by any mechanical power.⁴ The words "must be not allowed" have been held not to be equivalent to "must be prevented."⁵ Any person allowed to be in a space, or to work, in contravention is deemed to be employed contrary to the provisions of the Act.⁶

SUBSECTION (10).—*Cleaning Machinery in Motion.*

35. A child³ is not allowed⁵ to clean any part of machinery in a factory or any place under any machinery, other than overhead mill gearing, while it is in motion by the aid of any mechanical power.⁷ If the machinery as a whole is in motion it is not permissible to clean any part of it, even though the actual part so cleaned is at rest.⁸ Employers were found liable in reparation where a child was permitted to clean a machine when in motion, although no direction had been given. The employers knew or were culpably ignorant of the fact that children in their factory were in the habit of cleaning machinery in motion.⁹ The prohibition applies to casual cleaning as well as regular cleaning,¹⁰ and to cleaning a machine of fluff primarily for its commercial value.¹¹ Young persons are not to be allowed to clean dangerous parts of the machinery while similarly in motion; and such parts of the machinery are presumed to be dangerous, unless the contrary is proved, as are so notified by the inspector to the occupier.¹² The effect of this provision is to throw upon the occupier the burden of proving that the machinery is not in fact dangerous. A young person or woman is not to be allowed to clean the mill gearing in a factory while it is in motion for the purpose of propelling any part of the manufacturing machinery.¹³ A woman, young person, or child allowed to clean in contravention of the section is deemed to be employed contrary to the Act.¹⁴

SUBSECTION (11).—*Means of Escape from Fire.*

36. Every factory, the construction of which began after 1st January 1892, and every workshop, the construction of which began on or after

¹ 1901 Act, s. 12 (1).

³ See Employment of Women, etc. Act, 1920, s. 1.

⁵ *Crabtree v. Fern Spinning Co., Ltd.*, 1901, 85 L.T. 459.

⁷ Sec. 13 (1).

⁹ *Goldie v. Biggarts & Co.*, 1886, 2 Sh. Ct. Rep. 213, 424.

¹⁰ *Reid v. British Basket Co., Ltd.* (O.H.), 1913, 2 S.L.T. 201.

¹¹ *Taylor v. Dawson & Son, Ltd.*, [1911] 1 K.B. 145.

¹³ Sec. 13 (3).

² Sec. 12 (2).

⁴ 1901 Act, s. 12 (3).

⁶ 1901 Act, s. 12 (4).

⁸ *Pearson v. Belgian Mills Co.*, [1896] 1 Q.B. 244.

¹² 1901 Act, s. 13 (2).

¹⁴ Sec. 13 (4).

1st January 1896, in which more than forty persons are employed,¹ must be furnished with a certificate from the local authority under the Public Health Acts that it is provided with such means of escape in case of fire as can reasonably be required. It is the duty of the local authority to examine every such factory and workshop, and, on being satisfied that the factory and workshop is so provided, to grant a certificate to that effect. The certificate must specify the means of escape provided.² The owner of factories, of which the construction began on or before 1st January 1892, and workshops, of which the construction began before 1st January 1896, in which more than forty persons are employed, may be compelled by the local authority, after notice, to make all necessary provision for escape in case of fire.³ In case of a difference of opinion arising between the owner and the local authority, the difference is to be referred to arbitration under the First Schedule of the Act, and any award thereunder shall be binding on the parties to the arbitration.⁴ In the case of two or more separate factories (not tenement factories) in the same building and belonging to the same owner, the notice and award will be invalid if they do not deal with them separately.⁵ The owner cannot be compelled to undertake operations contrary to the rights of third parties.⁶ A factory inspector has the power of acting in place of a local authority.⁷ The means of escape provided in case of fire must be kept in good condition and free from obstruction.⁸ Liability for maintenance, once means of escape have been provided, is upon the occupier, except in the case of tenement factories, when the owner is throughout responsible.⁹ If the owner alleges that the occupier ought to pay the whole or part of the expense of alterations, he may apply to the Sheriff Court for an order.¹⁰ A local authority, in addition to its general powers regarding prevention of fire, may make bye-laws providing for means of escape from fire in any factory or workshop.¹¹

37. While any employee is in a factory or workshop for work or meals, the doors, and the doors of any room where any such person is, must not be locked or bolted or fastened so that they cannot be easily and immediately opened from the inside.¹² In every factory or workshop, the construction of which began on or after 1st January 1896, the doors of each room in which more than ten persons are employed must, except in the case of sliding doors, open outwards.¹³ These provisions do not apply to men's workshops.¹⁴

¹ *In re London County Council and Tubbs*, 1903, 68 J.P. 29.

² 1901 Act, s. 14 (1).

³ Sec. 14 (2).

⁴ Sec. 14 (3).

⁵ *Toller v. Spiers & Pond, Ltd.*, [1903] 1 Ch. 362.

⁶ *London County Council v. Lewis*, 1900, 82 L.T. 195.

⁷ See para. 22, *supra*.

⁸ 1901 Act, s. 14 (6).

⁹ Sec. 14 (7).

¹⁰ Sec. 14 (4); see para. 26, *supra*.

¹¹ Sec. 15; see Model Bye-laws prepared by Ministry of Health, Redgrave, p. 478.

¹² Sec. 16 (1).

¹³ Sec. 16 (2).

¹⁴ Sec. 157.

SUBSECTION (12).—*Prohibition of Use of Dangerous Machines, etc.*

38. If a Sheriff, on summary complaint by an inspector, is satisfied that any part of the ways, works, machinery, or plant used in a factory or workshop (including a steam boiler used for generating steam) is in such a condition that it cannot be used without danger to life or limb, he may prohibit its use entirely or, if capable of repair or alteration, until duly repaired or altered.¹ *Interim* orders may be made upon evidence.² In case of contravention of an order the person entitled to control the use of the part of the ways, works, machinery, or plant is liable to a maximum fine of forty shillings per day.³ “Ways” includes the floor of a workshop,⁴ a temporary staging of loose planks,⁵ a hole in a mill yard covered with loose planks,⁶ or a staircase,⁷ but not the open joists of an unfinished house,⁸ and a temporary obstruction on a roadway is not a defect in “ways.”⁹ “Works used” means works completed and in use, not partially constructed works.¹⁰

SUBSECTION (13).—*Prohibition of Use of Dangerous or Unhealthy Premises.*

39. A Sheriff may make a similar order to that above mentioned in the case of any place used as a factory or workshop, or part, in such condition that any manufacturing process or handicraft carried on there cannot be carried on without danger to health or to life or limb, prohibiting its use for that purpose until such works have been executed as are, in his opinion, necessary to remove the danger.¹¹ These proceedings, however, are not to be taken where proceedings might be taken by the local authority, unless the factory inspector is authorised to take proceedings under the Public Health Act.¹² Contravention of an order involves a maximum fine upon the occupier (or in tenement factories, owner) of forty shillings per day.¹³

SUBSECTION (14).—*Notice of Accidents.*

40. Where any accident occurs in a factory or workshop, which either causes loss of life to a person employed in the factory or workshop, or disables any such person for more than three days from earning full wages at the work at which he was employed, written notice of the accident, as prescribed, must forthwith be sent to the factory

¹ 1901 Act, s. 17 (1).² Sec. 17 (2).³ Sec. 17 (3).⁴ *Willets v. Watt & Co.*, [1892] 2 Q.B. 92.⁵ *Giles v. Thames Ironworks Co.*, 1885, 1 T.L.R. 469.⁶ *Bromley v. Cavendish Spinning Co., Ltd.*, 1886, 2 T.L.R. 881.⁷ *Wood v. Dorrall & Co.*, 1886, 2 T.L.R. 550.⁸ *M'Gowan v. Smith*, 1907 S.C. 548.⁹ *M'Giffin v. Palmer*, 1882, 10 Q.B.D. 1.¹⁰ *Howe v. Finch & Co.*, 1886, 17 Q.B.D. 187; cf. *Brannigan v. Robinson*, [1892] 1 Q.B. 344.¹¹ 1901 Act, s. 18 (1).¹² Sec. 18 (2); see para. 22, *supra*.¹³ Sec. 18 (3).

inspector of the district.¹ Where an accident so notified results in death, written notice of the death must be sent to the inspector by the occupier as soon as it comes to his knowledge.² The penalty for failure by the occupier to notify is a fine not exceeding £10.³ Where the occupier is not the actual employer, the actual employer must report the accident to the occupier, under a maximum penalty of £5.⁴

41. If the Home Secretary considers that, by reason of the risk of serious injury to persons employed, notice should be given in every case of any special class of explosion, fire, collapse of buildings, accidents to machinery or plant, or other occurrences in [a mine or quarry, or in] a factory or workshop, or part of a factory or workshop, he may by order extend the above provisions to any such class of occurrences, whether personal injury or disablement is caused or not, and may appoint a limit of time for the notice.⁵ Such an order has been made relating to cases of bursting of revolving vessels, wheels, or stones; breaking of ropes or chains; and certain fires.⁶

42. The above provisions apply to docks, etc.,⁷ certain buildings,⁸ private railway lines and sidings,⁹ certain industrial diseases in factories and workshops,¹⁰ but not to quarries¹¹ or domestic factories or workshops.¹² Notice of certain explosions must be given to the Home Office.¹³ Anthrax cases and certain cases of poisoning must be notified to the certifying surgeon as well as the factory inspector.¹⁴ A register of accidents must be kept at the factory.¹⁵ For the purposes of employer's liability the Workmen's Compensation Act, 1925,¹⁶ imposes upon an occupier of a factory or workshop the duty of exhibiting instructions as to the giving of notice of accidents, the making of claims, and the procedure to be followed in industrial diseases, under a maximum penalty of £5 in case of failure.

SUBSECTION (15).—*Investigation of Accidents.*

(i) *By Certifying Surgeon.*

43. The following provisions were formerly applicable to accidents and cases of anthrax and certain poisoning cases. When a certifying surgeon receives statutory notice of an accident, etc., he must proceed at once to the factory or workshop, make a full investigation as to the nature and cause of the death or injury due to the accident, and send a report within twenty-four hours to the factory inspector. For this purpose the surgeon has the same powers as an inspector, and also

¹ Workmen's Compensation Act, 1923 (13 & 14 Geo. V. c. 42), s. 28 (1), repealing s. 4 (1) of Notice of Accidents Act, 1906 (6 Edw. VII. c. 53), which Act repealed s. 19 of the 1901 Act.

² Notice of Accidents Act, 1906, s. 4 (2).

³ *Ibid.*, s. 5.

⁴ 1901 Act, s. 104.

⁵ Sec. 73 (3).

⁶ 1901 Act, s. 111.

⁷ 1901 Act, s. 73 (3).

⁸ *Ibid.*, s. 4 (3).

⁹ *Ibid.*, s. 4 (4).

¹⁰ S.R. & O. 1906, No. 934, p. 174.

¹¹ Sec. 106.

¹² Quarries Act, 1895 (57 & 58 Vict. c. 4), s. 3.

¹³ Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 63.

¹⁴ Sec. 129 (1) (c).

¹⁵ 15 & 16 Geo. V. c. 84, s. 15.

power to enter any room in a building to which the victim has been removed.¹ The section now only applies to cases of anthrax and certain poisoning cases.² But it is still the duty of the certifying surgeon to investigate and report upon injuries caused by exposure to gas, fumes, etc., or any other special cause specified in instructions to be issued by the Home Secretary defining such special causes and requiring the district inspector to refer all cases reported to him to the certifying surgeon. The duty further extends to any case which the inspector refers to the surgeon in pursuance of general or special instructions of the Home Office. The surgeon has the powers above referred to.³

(ii) *By Fatal Accidents Inquiry.*

44. Sec. 21 of the Act of 1901 refers to coroner's inquests, and is not applied to Scotland. The provisions of the Fatal Accidents Inquiry (Scotland) Act, 1895,⁴ however, appear to be adequate to cover the same ground. In any case where it is competent for any official or department to cause public inquiry to be made into the circumstances of an accident,⁵ the Sheriff-Clerk intimates the time and place of the inquiry to the official or department.⁶ In the case of an accident in a factory or workshop, the factory inspector, the employer, fellow-workmen of the deceased, and his wife, husband, or other relatives, may appear at, take part in, and adduce evidence at the inquiry, either personally, by counsel or agents, or by anyone allowed by the Sheriff to represent them.⁷ In the case of a factory or workshop accident the Sheriff-Clerk transmits copies of the petition, evidence recorded, and reports to the factory inspector for the district.⁸

(iii) *By Home Office Formal Investigation.*⁹

45. When satisfied that it is expedient, the Home Secretary may direct that a formal investigation of an accident be held, by a competent person with or without legal and other assessors, in open court, with all the powers of a Court of summary jurisdiction under the Act, and all the powers of a factory inspector, and the following additional powers: (a) of entry and inspection of any place or building; (b) of summoning witnesses and requiring answers to questions; (c) of requiring production of books, papers, etc.; (d) of administering oaths and requiring witnesses to make and sign a declaration of the truth of their evidence. Witnesses are allowed taxed expenses, and the expense of the inquiry and remuneration of assessors falls on the Home Office. Witnesses failing to attend or produce documents after being tendered expenses, unless they prove

¹ 1901 Act, s. 20.

² Police, Factories, etc. (Miscellaneous Provisions) Act, 1916 (6 & 7 Geo. V. c. 31), s. 8 (1), (2), and Schedule.

³ *Ibid.*, s. 8 (1).

⁵ See next para.

⁷ *Ibid.*, s. 5 (3).

⁴ 58 & 59 Vict. c. 36 (amended by 6 Edw. VII. c. 35).

⁶ 58 & 59 Vict. c. 36, s. 4 (2).

⁸ *Ibid.*, s. 5 (5).

⁹ 1901 Act, s. 22.

reasonable excuse, are liable to a maximum fine of £10. The Court is to report to the Home Office the causes of the accident and any observations it thinks right to make, and the report, or that of an inspector, may be published by the Home Office.

SUBSECTION (16).—*Reparation.*

46. The liability at common law of an employer for injury received by an employee may be based upon breach of a duty falling upon the employer under the Factory Acts. Such claims may be based upon an alleged contravention of the spirit of the Acts which is to protect children and young persons against themselves. If an employer sets a person to do work too dangerous for one of his age, he will be *prima facie* liable for any injury.¹ This applies with greater force where a young person has been employed contrary to the Acts,² but not where he has obtained the employment by misrepresenting his age or educational qualifications.³ It follows from the nature of the ground of liability that a plea of contributory negligence is difficult to sustain,⁴ but it has been sustained.⁵ Young persons employed at dangerous machinery must be given due instruction. Failure to give such is negligence.⁶

47. Claims may be founded on contraventions of specific provisions of the Acts, *e.g.* as to fencing of machinery.⁷ Contravention will *prima facie* entitle employees to damages for injury resulting therefrom, even if they were not actually engaged in their duty at the time.⁸ The employer in case of a contravention will not be freed from liability by the fact that the accident was partly due to a mistake on the part of the employee,⁹ nor can he maintain the defence of common employment.¹⁰ It has been held in England that there is liability even when the injured workman was fully aware of the danger and voluntarily disregarded it.¹¹ But provisions of the Act, and regulations thereunder, create no new and separate liability which can be founded upon, by a person not an employee, as a separate ground of action.¹²

¹ *Sharp v. Pathhead Spinning Co.*, 1885, 12 R. 574.

² *Gibb v. Crombie*, 1875, 2 R. 886; *Reid v. British Basket Co. (O.H.)*, 1913, 2 S.L.T. 201.

³ *Carty v. Nicoll*, 1878, 6 R. 194; cf. *Gibb v. Crombie*, *supra*.

⁴ *Traill v. Small & Boase*, 1873, 11 M. 888; *Gibb v. Crombie*, *supra*; *Sharp v. Pathhead Spinning Co.*, *supra*.

⁵ *Morris v. Boase Spinning Co.*, 1895, 22 R. 336.

⁶ *Grizzle v. Frost*, 1863, 3 F. & F. 622.

⁷ *Cases cit. supra*; *Shields v. Murdoch & Cameron*, 1893, 20 R. 727; *Murray v. Bernard & Co. (O.H.)*, 1897, 5 S.L.T. 101; cf. *Milligan v. Muir & Co.*, 1891, 19 R. 18 (machine driven by hand); and *Robb v. Bulloch, Lade & Co.*, 1892, 19 R. 971.

⁸ *Traill v. Small & Boase*, *supra*; *Kelly v. Glebe Sugar Refining Co.*, 1893, 20 R. 833.

⁹ *Pringle v. Grosvenor*, 1894, 21 R. 532.

¹⁰ *Ibid.*; *Kelly v. Glebe Sugar Refining Co.*, *supra*; *Butler v. Fife Coal Co., Ltd.*, [1912] A.C. 149.

¹¹ *Thomas v. Quartermaine*, 1886, 18 Q.B.D. 685; *Baddeley v. Earl Granville*, 1887, 19 Q.B.D. 423; *Davies v. Thomas Owen & Co., Ltd.*, [1919] 2 K.B. 39.

¹² *Adamson v. M'Guinness (O.H.)*, 1907, 14 S.L.T. 672.

SECTION 2.—CONDITIONS OF EMPLOYMENT OF WOMEN, YOUNG PERSONS, AND CHILDREN.

SUBSECTION (1).—*Definitions.*

48. The definition of "employment" has already been given.¹ "Woman" means a woman of the age of eighteen and upwards.² "Young person" means a person who has ceased to be a child and is under the age of eighteen.² "Child," under the Factory Act, means a person who is under the age of fourteen years, and who has not, being of the age of thirteen years, obtained the certificate of proficiency or attendance at school mentioned in Part III. of the Act.³ This is superseded by the Employment of Women, etc. Act, 1920,⁴ which gives the simple definition of "a person under the age of fourteen years."⁵

SUBSECTION (2).—*Employment of Children.*

49. Part II. of the Factory Act, 1901, prohibits the employment of children under twelve, and imposes numerous restrictions on the employment of children in factories and workshops.⁶ Part III. imposes on the parent and the occupier certain duties as to school attendance by children employed in a factory or workshop.⁷ These provisions are practically superseded, except as to domestic factories and workshops,⁸ by the Employment of Women, Young Persons, and Children Act, 1920,⁹ which enacts that no child (*i.e.* under fourteen) shall be employed in any "industrial undertaking,"¹⁰ except one in which only members of the same family are employed.¹¹ The term "industrial undertaking" is so widely defined¹² that it is thought to cover all factories and workshops. Further, under the Education (Scotland) Act, 1918,¹³ Part III. of the Factory Act, 1901, is repealed prospectively¹⁴ as from the "appointed day" for the extension of the school age to fifteen,¹⁵ and it is enacted that no child or young person under fifteen who has not been exempted under the Education (Scotland) Act, 1901, from the obligation to attend school shall be employed in any factory or workshop to which the Factory and Workshop Acts apply, unless such child or young person was lawfully so employed at the appointed day.¹⁶

50. In view of the very limited application which the enactments of the Factory Act can now have in respect of children, it is not proposed to do more than refer to those enactments. They deal with the following:

¹ See para. 18, *supra*.

² 1901 Act, s. 156, and Employment of Women, etc. Act, 1920, s. 4.

³ 1901 Act, s. 156.

⁴ 10 & 11 Geo. V. c. 65.

⁵ Sec. 4.

⁶ See para. 50, *infra*.

⁷ 1901 Act, ss. 68–72.

⁸ See para. 56, *infra*.

⁹ 10 & 11 Geo. V. c. 65.

¹⁰ Sec. 1 (1).

¹¹ Sec. 3 (2).

¹² Sec. 4, and Schedule.

¹³ 8 & 9 Geo. V. c. 48, s. 17.

¹⁴ Sixth Schedule.

¹⁵ Sec. 14.

¹⁶ Sec. 17.

- (1) Hours of employment in textile¹ and non-textile factories,² and print works and bleaching and dyeing works.³
 - (2) Restriction on employment inside and outside a factory or workshop on the same day.⁴
 - (3) Notice to be affixed specifying period of employment, meal times, half-time arrangements.⁵
 - (4) Simultaneous meal times, and prohibition of employment during same.⁶
 - (5) Prohibition of Sunday employment.⁷
 - (6) Annual holidays and half-holidays.⁸
 - (7) Special exceptions as to hours and holidays.⁹
 - (8) Allowance of five hours' spell in certain textile factories.¹⁰
 - (9) Exceptions as to meal times.¹¹
 - (10) Substitution of another day for Saturday.¹²
 - (11) Holidays on different days for different sets.¹³
 - (12) Power to Home Secretary to impose sanitary requirements as a condition of special exceptions,¹⁴ and to rescind orders,¹⁵ and as to registers.¹⁶
 - (13) Certificates by certifying surgeon of fitness for employment.¹⁷
 - (14) Educational enactments.¹⁸
- No further reference to children will be made in dealing with the provisions of the Factory Act applicable to employment, except as to domestic factories and workshops.¹⁹

SUBSECTION (3).—*Hours limiting Employment.*²⁰

(i) *Textile Factories.*²¹

51. Except on Saturday the period of employment for women and young persons is from 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m. On Saturdays the period of employment begins either at 6 a.m. or 7 a.m. If the former, and if not less than one hour is allowed for meals, it ends on Saturday at noon for any manufacturing process, and at 12.30 p.m. for any employment whatever; when less than an hour is allowed for meals, the respective times of ending are 11.30 a.m. and noon. If the latter, the times of ending are 12.30 p.m. and 1 p.m., irrespective of meals. Two hours must be allowed for meals on weekdays, of which at least one hour must be before 3 p.m., and not less than half an hour must be allowed on Saturdays. Employment must not be continuous for more than four and a half hours without at least half an hour for a meal.

¹ 1901 Act, s. 25.

⁵ Sec. 32.

⁹ Sec. 36.

¹³ Sec. 45.

¹⁷ Secs. 63–67.

²⁰ Not hours of work.

² Sec. 27.

⁶ Sec. 33.

¹⁰ Sec. 39.

¹⁴ Sec. 58.

¹⁸ Part III. of Act, ss. 68–72.

²¹ 1901 Act, s. 24.

³ Sec. 28.

⁷ Sec. 34.

¹¹ Sec. 40.

¹⁵ Sec. 59.

¹⁹ See para. 56, *infra*.

⁴ Sec. 31.

⁸ Sec. 35.

¹² Sec. 43.

¹⁶ Sec. 60.

(ii) *Print Works, Bleaching and Dyeing Works.*

52. Print works, and bleaching and dyeing works, though declared to be non-textile, have the above periods, except that continuous work for five hours without a meal is permitted.¹ In textile factories solely used for the making of elastic web, ribbon, or trimming, there may be five hours' continuous employment between 1st November and 31st March, provided that the period of employment fixed by the occupier, and specified in the notice, begins at 7 a.m. and that the whole time between that hour and 8 a.m. is allowed for meals.² This exception may be extended by the Home Secretary, in healthy processes, to suit the customary habits of the employees, and the limitation to five months may be omitted, by Special Order, as to hosiery factories.³ There are further special exceptions.⁴

(iii) *Non-textile Factories and Workshops.*⁵

53. The period of employment, except on Saturday, for women and young persons is 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m., or 8 a.m. to 8 p.m. The Saturday period is 6 a.m. to 2 p.m., or 7 a.m. to 3 p.m., or 8 a.m. to 4 p.m., with not less than half an hour for meals. On week-days at least one and a half hours must be allowed for meals, of which one hour, either at the same or different times, must be before 3 p.m. A woman or a young person in a non-textile factory, and a young person in a workshop, must not be employed continuously for more than five hours without at least half an hour for a meal. There are special exceptions.⁶ Employment between 9 a.m. and 9 p.m. may be allowed, by Special Order, by the Home Secretary in any class of non-textile factories, or workshops, or parts thereof, where he is satisfied that the customs or exigencies of the trade require it, and that there will be no injury to health.⁷ Where a woman or young person has not been actually employed for more than eight hours on any day in a week, and notice of this has been affixed and served on the inspector, the period of employment on Saturday in that week for that woman or young person may be from 6 a.m. to 4 p.m., with an interval of not less than two hours for meals.⁸

(iv) *Laundries.*⁹

54. In laundries which are not merely ancillary to another business, the period of employment of women may on three weekdays be 6 a.m. to 7 p.m., or 7 a.m. to 8 p.m., or 8 a.m. to 9 p.m., with a corresponding reduction on the other weekdays so that the total of the periods, including meal times, shall not exceed sixty-eight hours in any week.¹⁰

¹ 1901 Act, s. 28.² Sec. 39 (1), (2).³ Sec. 39 (3); see S.R. & O. Rev., 1904, iv. Factory and Workshop, pp. 10, 11.⁴ See para. 70 *et seq.*, *infra*. ⁵ 1901 Act, s. 26. ⁶ See para. 67 *et seq.*, *infra*.⁷ 1901 Act, s. 36; see S.R. & O. 1907, No. 1009, p. 134.⁸ Sec. 30. ⁹ Factory and Workshop Act, 1907 (7 Edw. VII. c. 39), s. 2.¹⁰ "Week" begins and ends at midnight on Saturday (1901 Act, s. 156).

Or, at the option of the occupier, the period may, on not more than four weekdays in any week, nor sixty days in any year, be 6 a.m. to 7 p.m., or 7 a.m. to 8 p.m., or 8 a.m. to 9 p.m. Different periods of employment may be fixed for different days of the week. The occupier may not change from one system to the other oftener than once a year. The above provisions are special exceptions under the principal Act, and require to be registered as such. In reckoning the sixty days, every day on which any woman was employed overtime is included. Subject to these special provisions, the principal Act applies.

(v) *Women's Workshops.*¹

55. In a workshop which is conducted on the system of not employing therein either children or young persons, and the occupier of which has notified an inspector of his intention to conduct it on that system, the period of employment for women is, except on Saturday, a specified period of twelve hours between 6 a.m. and 10 p.m., and on Saturday eight hours between 6 a.m. and 4 p.m., including a specified period of at least one and a half hours for meals and absence from work on weekdays, and of half an hour on Saturday. Notice of change of the system must be made before it is changed, and not oftener than once a quarter, except for special cause allowed in writing by an inspector.

(vi) *Domestic Factories and Domestic Workshops.*²

56. The above regulations do not apply to these places, for which there are the following special rules. The period of employment for a young person, except on Saturday, is 6 a.m. to 9 p.m., and on Saturday 6 a.m. to 4 p.m. Not less than four and a half hours on weekdays, and two and a half hours on Saturdays must be allowed within the period for meals and absence from work. The period of employment for a child on every day is 6 a.m. to 1 p.m., or 1 p.m. to 8 p.m. (Saturday, 4 p.m.). For the purpose of the educational provisions of the Act (not yet repealed as to Scotland) the child is deemed to be employed in a morning, or afternoon, set; and it may not be employed (a) before or (b) after 1 p.m., in two successive periods of seven days, nor on Saturday in any week before (or after) 1 p.m., if on any other day in the same week it has been employed before (or after) that hour. A child must not be employed continuously for more than five hours without at least a half-hour meal interval.

SUBSECTION (4).—*Restriction on Employment Inside and Outside on the Same Day.*

57. A woman or young person must not, except during the period of employment, be employed in the business of a factory or workshop outside it on any day on which he or she is employed within it, both

¹ 1901 Act, s. 29.

² Sec. 111; for definition, see para. 11, *supra*.

before and after the dinner hour. Taking out work to be done outside the factory is such employment on the day on which the work is given or taken out.¹ If a woman or young person is employed by the occupier on the same day both in a factory or workshop and in a shop, then the whole time during which he or she is employed must not exceed the number of hours permitted by the Act for her or his employment in the factory or workshop on that day, and if the employment is outside the statutory "period of employment," an entry of it must be made in the general register.² The Home Secretary, however, may, by Special Order, exempt any class of factories or workshops or parts thereof from the above provisions to suit the customs or exigencies of the trade either generally or in any particular locality.³

SUBSECTION (5).—*Notice fixing Period of Employment, etc.*⁴

58. The occupier may fix within the limits allowed by the Act, and must, subject to any special exceptions, specify in a notice to be affixed in the factory or workshop⁵ (a) the period of employment, and (b) the times allowed for meals, and must keep to these, until he has served on an inspector and affixed in the factory or workshop a notice of intention to change. He may not change oftener than once a quarter, unless for special cause allowed in writing by an inspector. Where an inspector, by notice in writing, names a public clock or some other clock open to public view for these purposes, they are to be regulated by that clock. This section does not apply to domestic factories or workshops.⁶ In the case of a tenement factory the owner is responsible, but the occupier may affix his own notices if he pleases.⁷

SUBSECTION (6).—*Regulation of Meal Times.*

59. Women and young persons employed in a factory or workshop are to have the times allowed for meals at the same hour of the day, and must not during any part of the meal time be employed in the factory or workshop, or be allowed to remain in a room where a manufacturing process or handicraft is then being carried on.⁸ Domestic factories and workshops are excepted.⁹

60. The above provisions relating to the same hour of meal times do not apply to blast furnaces, iron or paper mills, glass works or letterpress printing works.¹⁰ Those as to employment, etc. during meal times do not apply to iron or paper mills, glass works or letterpress printing works.¹¹ In a part of any print works or bleaching or dyeing works in which the process of dyeing or open-air bleaching is

¹ 1901 Act, s. 31 (1)–(3).

² Sec. 31 (4); cf. Shops Act, 1912, s. 2 (2).

³ Sec. 46. No order in force.

⁴ Sec. 32.

⁵ Or, when ordered, separate branches of the factory or workshop, s. 151.

⁶ Sec. 111 (4) (b).

⁷ Sec. 87 (1) (v).

⁸ Sec. 33.

⁹ Sec. 111 (4) (a).

¹⁰ Sec. 40 (1).

¹¹ Sec. 40 (2).

carried on, male young persons may have different hours for meals from the other young persons and the women, and may, during their meal time, be employed or allowed to remain in a room where a manufacturing process is being carried on; and conversely, during that meal time, the others may similarly be employed or allowed to remain in a room.¹ Where the Home Secretary is satisfied that it is necessary, in any class of factories or workshops or parts thereof, by reason of continuous process or other special cause, to allow women and young persons to have meals at different hours, or to be employed or remain in a room where a process is going on, he may do so by Special Order.²

SUBSECTION (7).—*Sunday Employment.*

61. Except where specially excepted,³ women and young persons may not be employed on Sunday in a factory or workshop.⁴

SUBSECTION (8).—*Holidays and Half-holidays.*

62. Subject to special exceptions,⁵ the occupier of a factory or workshop in Scotland must allow in each year to women and young persons (1) as whole holidays (*a*) in burghs or police burghs two days, not less than three months apart, to be fixed by the town council, (*b*) elsewhere, two whole holidays, not less than three months apart, fixed by the occupier; and (2) eight half-holidays fixed by the occupier, in lieu of two of which one whole holiday may be allowed.⁶ At least half of the holidays must be between 15th March and 1st October.⁷ During the first week in January a notice of the holidays must be affixed in the factory or workshop and a copy forwarded to the inspector the same day, failing which cessation from work does not count as a holiday, but a notice may be changed by a subsequent notice affixed and sent in like manner not less than fourteen days before the whole holiday or half-holiday in question.⁸ A half-holiday comprises at least one-half of the period of employment for women and young persons on a day other than a Saturday or a day substituted for Saturday.⁹ Employment on whole or half-holidays is employment contrary to the Act, and failure to fix such holidays in conformity with the Act renders the occupier liable to a maximum fine of £5.¹⁰

63. The Home Secretary may, however, by Special Order, when satisfied that the customs or exigencies of the trade in any class of non-textile factories or workshops, generally or in any particular locality require it, authorise the occupiers of such class to allow all or any of the holidays on different days to any of the women or young

¹ 1901 Act, s. 40 (3).

² Sec. 40 (4); see S.R. & O. Rev., 1904, iv. Factory and Workshop, pp. 12–17, 19; S.R. & O. 1904, No. 1220, p. 143; S.R. & O. 1908, No. 807, p. 329.

³ See para. 72, *infra*.

⁵ See paras. 63, 68, 69.

⁸ Sec. 35 (3).

⁶ 1901 Act s. 35 (1).

⁹ Sec. 35 (4).

⁴ 1901 Act, s. 34.

⁷ Sec. 35 (2).

¹⁰ Sec. 35 (5), (6).

persons or to any sets of these.¹ The occupier must give notice of his intention to avail himself of the exception.² Orders made cover certain printing works where the public interest demands that they should be kept open, certain premises connected with retail shops, premises for making clothing or food, and plate glass factories,³ and also hospital laundries in Scotland.⁴

SECTION 3.—SPECIAL EXCEPTIONS AS TO CONDITIONS OF EMPLOYMENT.⁵

SUBSECTION (1).—*General Conditions for Exceptions.*

(i) *Sanitary Requirements.*

64. Where it appears to the Home Secretary that the adoption of any special means for cleanliness or ventilation in the case of overtime or night work, or regulations as to the total number of hours of employment in each week and the intervals between such periods in the case of night work are required for the protection of women or young persons affected by an exception, he may, by Special Order, direct the adoption of such means or regulations as a condition. He may also rescind such an Order, with power to make a new one.⁶ In the case of failure to observe such a condition, either (a) the premises are deemed not to be kept in conformity with the Act, or (b) the employment is deemed contrary to the provisions of the Act.

(ii) *Rescinding Exceptions granted by Order.*

65. The Home Secretary may rescind an order granting an exception, if he thinks the exception injurious to health or no longer necessary, without prejudice to a new grant.⁷

(iii) *Notices by Occupier, Registers, etc.*

66. Seven days before an occupier (or owner in case of tenement factory) avails himself of any special exception, he must serve on the inspector and affix in the premises a notice of his intention, and keep the notice fixed while he avails himself of the exception.⁸ Before service the special exception is deemed not to apply. After service the occupier or owner cannot competently prove that the exception does not apply, unless he has served another notice giving up the exception.⁹ Except in the case of fish and fruit preserving,¹⁰ the notice must specify the hours for the beginning and end of the period of employment, and for meal times, where these differ from the ordinary hours.¹¹ The occupier must also enter in the prescribed register,¹² and report to the inspector,

¹ 1901 Act, s. 45.

² Sec. 60.

³ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 24.

⁴ S.R. & O. 1908, No. 808, p. 330, as amended by S.R. & O. 1909, No. 1457, p. 300.

⁵ 1901 Act, ss. 36–60.

⁶ Sec. 58.

⁷ Sec. 59.

⁸ Sec. 60 (1).

⁹ Sec. 60 (2).

¹⁰ See para. 68, *infra*.

¹¹ 1901 Act, s. 60 (3).

¹² Official Form, No. 338, issued by inspectors.

the prescribed particulars of the employment of a woman or young person in pursuance of an exception, and in case of overtime keep affixed in the premises for the prescribed time a notice with the prescribed particulars, and report to the inspector not later than 8 p.m. in the evening on which overtime is being worked.¹ A report of an occupier's intention to employ any persons overtime in virtue of an exception is, unless withdrawn, *prima facie* evidence in proceedings under the Act, that he has in fact employed persons overtime in accordance with the report.²

SUBSECTION (2).—*Males over Sixteen in Lace Factories and Bakehouses.*³

67. In the part of a textile factory in which a machine for the manufacture of lace is moved by mechanical power the period of employment for a male over sixteen may be 4 a.m. to 10 p.m., and in a bakehouse, 5 a.m. to 9 p.m., provided that (a) when employed on any day before or after the ordinary period of employment he must be allowed for meals and absence from work not less than nine hours between 4 a.m. and 10 p.m. (bakehouses, seven hours between 5 a.m. and 9 p.m.); (b) when employed on any day before the ordinary period he must not be employed on the same day after the end of the ordinary period; and (c) when employed on any day after the end of the ordinary period he must not be employed next morning before the beginning of the ordinary period. "Ordinary period" means the period of employment for women or young persons under sixteen, and, if none are employed, such period as can under the Act be fixed for them, and notice of such period must be affixed in the premises. The provisions as to lace factories are now affected by the Employment of Women, etc. Act, 1920, so as to make the earliest morning hour 5 a.m., except under certain circumstances.⁴

SUBSECTION (3).—*Fish and Fruit Preserving.*⁵

68. The provisions of the Act relating to period of employment, meal times, and holidays are declared not to apply to women and young persons engaged (a) in processes in the preserving and curing of fish, which must be carried out immediately on the arrival of the fishing boats in order to prevent the fish from being destroyed or spoiled, or (b) in the process of cleaning and preparing fruit so far as is necessary to prevent its spoiling immediately on its arrival at a factory or workshop from June to September inclusive. The latter exception is subject to conditions, by Special Order, relating to sanitary and washing accommodation, ventilation, lighting, etc.⁶ Under this section the

¹ 1901 Act, s. 60 (4).

² Sec. 60 (6).

³ Secs. 37, 38.

⁴ 10 & 11 Geo. V. c. 65, s. 1 (3); Schedule, Pt. II.

⁵ 1901 Act, s. 41; distinguish from processes in s. 50 (para. 75, *infra*).

⁶ Sec. 41 (1) (b); and S.R. & O. 1907, No. 728, p. 135.

statutory notice need not specify the period of employment or meal times.¹

SUBSECTION (4).—*Creameries.*

69. In the case of creameries the beginning and end of the period of employment of women and young persons,² and meal times, may be varied by Special Order, and employment allowed, for not more than three hours, on Sundays and holidays, but the order may not permit any excess over either the daily or weekly maximum number of hours of employment allowed by the Act.³ An order has been made which provides *inter alia* that no overtime shall be worked in pursuance of any other exception.⁴

SUBSECTION (5).—*Substitution of Another Day for Saturday.*⁵

70. To suit the customs or exigencies of the trade in any class of non-textile factories or workshops, generally or in a particular locality, a special exception may be granted by order⁶ to that class, authorising the occupier to substitute by notice some other day for Saturday as regards the hour at which the period of employment is required to end. In such case the Act applies as if the substituted day were Saturday, and Saturday were an ordinary work day. For newspaper printing offices there may be a substitution in respect of some of the young persons employed.⁷

SUBSECTION (6).—*Saturdays in Turkey-red Dyeing.*⁸

71. In the process of turkey-red dyeing the period of employment on Saturday may extend till 4.30 p.m., but the week's limit of work (including these extra hours) must not be exceeded.

SUBSECTION (7).—*Jews.*

72. When the occupier of a factory or workshop is of Jewish religion then (a) if he keeps his premises closed on Saturday till sunset he may employ women and young persons from after sunset till 9 p.m.; and (b) if closed both before and after sunset on Saturday, he may employ women and young persons one hour every other day except Sunday in addition to the hours allowed by the Act, at the beginning or end of the period of employment, and not before 6 a.m. or after 9 p.m.⁹ Also where the occupier is of Jewish religion, a woman or young person of that religion may be employed on Sunday, provided (1) the premises are closed on Saturday and not open for traffic¹⁰ on Sunday; and (2) the

¹ 1901 Act, s. 41 (2); cf. s. 60 (para. 66, *supra*).

² See Education (para. 98 *et seq.*, *infra*) for further restrictions.

³ 1901 Act, s. 42; distinguish provisions of s. 50 *re* condensed milk (para. 75, *infra*).

⁴ S.R. & O. Rev., 1904, Factory and Workshop, p. 21.

⁵ 1901 Act s. 43.

⁶ S.R. & O. 1907, No. 1008, p. 137.

⁷ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 24.

⁸ 1901 Act s. 44.

⁹ Sec. 47.

¹⁰ *Goldstein v. Vaughan*, [1897] 1 Q.B. 549.

occupier does not avail himself of the above exception as to Saturday evening or the additional hour. When the section is taken advantage of, the Act applies as if Saturday were substituted in the provisions relating to Sunday, and Sunday, or Friday if specified in the notice, were substituted in the provisions relating to Saturday.¹

SUBSECTION (8).—*Overtime.*

73. No overtime can be worked in textile factories except in water mills,² and in the case of Jews.³

(i) *Press of Work.*⁴

74. In the non-textile factories and workshops and parts thereof specified in the Second Schedule⁵ (excluding women's workshops⁶), the period of employment for women on any day except Saturday or its substitute may be between 6 a.m. and 8 p.m., or 7 a.m. and 9 p.m., or 8 a.m. and 10 p.m., subject to the undernoted conditions. To meet the danger of material being spoiled by weather, and seasonal press of work, or sudden press of orders arising from unforeseen events, in any class of non-textile factories or workshops or parts thereof, if the Home Secretary is satisfied that there will be no injury to health, and that it is necessary, he may, by order, extend this exception to such premises.⁷

(ii) *Perishable Articles.*⁸

75. In factories and workshops and parts thereof in which the process of making preserves from fruit,⁹ or of preserving or curing fish,⁹ or of making condensed milk,¹⁰ is carried on, the period of employment for a woman may, on any day except Saturday or its substitute, be between 6 a.m. and 8 p.m., or 7 a.m. and 9 p.m., subject to the undernoted conditions. This exception may be extended by Special Order to any class of factories or workshops or parts thereof, where the Home Secretary is satisfied that it is necessary because of the perishable nature of the articles or materials.¹¹

76. The two above exceptions are subject to these conditions: (a) the woman must be allowed not less than two hours for meals, of which half an hour must be after 5 p.m.; (b) she must not be so employed for more than three days in any one week;¹² (c) overtime under these sections must not take place on more than thirty days (for press of work), or fifty days (for perishable articles) in any twelve months, and in reckoning that period, every day on which any woman

¹ 1901 Act s. 48.

³ Sec. 47 (para. 72, *supra*).

⁵ 1901 Act, Second Schedule, as extended by S.R. & O. 1908, No. 809, p. 330.

⁶ See s. 29 (para. 55, *supra*).

⁸ 1901 Act s. 50.

⁹ Distinguish from processes in para. 68, *supra*.

¹⁰ Distinguish from creameries (para. 69, *supra*).

² Sec. 52 (para. 78, *infra*).

⁴ Sec. 49.

⁷ See note 5 above.

¹¹ No order at present in force.

¹² Saturday 12 p.m. to Saturday 12 p.m. (s. 156).

has been employed overtime is to be taken into account.¹ A cubic space of 400 feet is required for every person working overtime.²

(iii) *Incomplete Process.*³

77. In bleaching and dyeing works, print works, iron mills, foundries, or paper mills in which male young persons are not employed during any part of the night, if the process in which a woman or young person⁴ is employed is in an incomplete state at the end of the period of employment, a woman or young person may, on any day except Saturday or its substitute, be employed for a further period not exceeding thirty minutes, but the total number of hours of the periods of employment in that week must not be exceeded. The exception may be extended to any class of non-textile factories or workshops or parts thereof where the Home Secretary is satisfied that the time for the completion of a process cannot, by reason of its nature, be accurately fixed, and that the extension can be made without injury to health.⁵

(iv) *Water Mills.*⁶

78. When it appears to the Home Secretary that factories driven by water power are liable to be stopped by drought or flood, he may, by Special Order, permit the employment of women and young persons⁴ between 6 a.m. and 7 p.m., on such conditions as he thinks proper, but so that no one is deprived of legal meal hours, or is so employed on Saturday or its substitute, and as regards factories liable to be stopped by drought so that the exception extends to no more than ninety-six days in any twelve months, and as regards factories liable to be stopped by floods no more than forty-eight days in any twelve months. Overtime is not to extend in any case beyond the time already lost during the previous twelve months. An order has been made for factories in which water power alone is used to move the machinery.⁷

(v) *Turkey-red Dyeing and Open-air Bleaching.*⁸

79. On any day except Saturday or its substitute a woman or young person⁴ may be employed beyond the period of employment so far as necessary for the purpose only of preventing damage from spontaneous combustion in turkey-red dyeing, and from any extraordinary atmospheric influence in open-air bleaching.

SUBSECTION (9).—*Night Work.*⁹

80. "Night" means the period between nine o'clock in the evening and six o'clock in the succeeding morning. "Week" means the period between midnight on Saturday night and midnight on the succeeding

¹ 1901 Act, s. 49 (1) (a), (b), and (c); sec. 50 (1) (a), (b), and (c).

² Sec. 3 (1).

³ Sec. 51.

⁴ See also Education (para. 98, *infra*).

⁵ No order in force.

⁶ 1901 Act, s. 52.

⁷ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 28.

⁸ 1901 Act, s. 53.

⁹ Sec. 57 of the 1901 Act is repealed.

Saturday night.¹ In addition to the provisions of the Act of 1901, the employment of young persons under eighteen at night in any industrial undertaking is forbidden, subject to exceptions, by the Employment of Women, etc. Act, 1920.²

(i) *Blast Furnaces, etc.*³

81. In blast furnaces, iron mills, letterpress printing works, and paper mills, a male young person of fourteen years and upwards may be employed during the night under the following conditions: (a) the period of employment must not exceed twelve consecutive hours, and must begin and end at the hour specified in the notice; (b) the provisions of the Act as to meal times must be observed, with necessary modifications as to the hours; (c) a young person employed during any part of the night must not be employed during the twelve hours preceding or succeeding the period of employment; (d) he must not be employed on more than six nights (blast furnaces and paper mills, seven nights) in any two weeks, but male young persons may be employed in three shifts of not more than eight hours each if there is an interval of two unemployed shifts between each two shifts of employment; and (e) in the four types of factories the employment must be incidental to the business of the factory as described in the schedule.⁴ The provisions of the Act regarding Saturday employment and holidays do not apply to a male young person employed in day and night turns in pursuance of the section.⁵ The exception under the section may be extended by order to any class of non-textile factories or workshops or parts thereof if the Home Secretary is satisfied that it is necessary by reason of the continuous nature of the process, and not injurious to health. Orders have been made for electrical stations,⁶ china clay works,⁷ certain reverberatory or regenerative furnaces,⁸ and the process of galvanising sheet metal and wire (except the pickling process).⁹

82. The above section and the orders referred to must now be read with the provisions of the Washington Convention on Night Work, embodied in the Employment of Women, etc. Act, 1920,¹⁰ under which the employment at night of young persons under eighteen (and also women) is forbidden, under certain exceptions.

(ii) *Glass Works.*¹¹

83. Male young persons of fourteen or over may work according to the accustomed hours of the works, provided that (a) the total hours

¹ 1901 Act, s. 15 (6); but see 10 & 11 Geo. V. c. 65, Schedule. See para. 142, *infra*.

² 10 & 11 Geo. V. c. 65, s. 1 (3), and Schedule, Pt. II. (see para. 141 *et seq.*, *infra*).

³ 1901 Act, s. 54. ⁴ 1901 Act, Sixth Schedule, Pt. I. ⁵ Sec. 54 (2).

⁶ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 29; see next para.

⁷ *Ibid.*, p. 30; see next para. ⁸ S.R. & O. 1924, No. 389, p. 54.

⁹ S.R. & O. 1913, No. 565, p. 129; and 10 & 11 Geo. V. c. 65, Schedule II. (2).

¹⁰ 10 & 11 Geo. V. c. 65, Schedule II. (see para. 141 *et seq.*, *infra*).

¹¹ 1901 Act, s. 55; affected, as regards persons not over sixteen, by the Act of 1920, Schedule II. (2); otherwise unaffected.

of the periods of employment must not exceed sixty in any week; (b) the periods of employment must not exceed fourteen hours in four separate turns per week, or twelve hours in five separate turns or any less number in the accustomed number of separate turns not exceeding nine; (c) a male young person must not work in any turn without an interval of not less than one full turn; (d) he must not be employed continuously for more than five hours without at least half an hour for a meal; and (e) he must not be employed on Sunday.

(iii) *Printing Newspapers.*¹

84. In a factory or workshop where the process of printing newspapers is carried on on not more than two nights in the week, a male young person over sixteen may be employed at night during not more than two nights in a week, as if he were no longer a young person, but must not be employed more than twelve hours in any consecutive period of twenty-four hours.

SUBSECTION (10).—*Employment of Women and Young Persons in Eight-hour Shifts by Day.*

85. On the joint application of the employer or employers of any factory or workshop or group of factories or workshops, and the majority of the workpeople therein concerned, the Home Secretary may authorise the employment of women and young persons of sixteen or over, at any time between 6 a.m. and 10 p.m. on any weekday, and between 6 a.m. and 2 p.m. on Saturday, in shifts averaging for each shift not more than eight hours per day. If, however, a joint representation is made to him by organisations representing a majority of the employers and workers in the industry or section of industry concerned that such orders should not be made for premises in the industry or section, the Home Secretary has no power to make such orders until the representation is withdrawn. Such a representation may also require the cessation of an order previously made, on the expiration of such reasonable period, not more than four months, as the Home Secretary may fix. Particulars of orders must be published, and no representation as regards premises in the industry or section to which the order relates shall be of any effect unless made within one month from the date of publication.²

86. Orders under the section shall be under such conditions as the Home Secretary considers necessary to safeguard the welfare and interests of the workers affected, and shall include power to revoke in the event of non-compliance or of abuses arising.³ He may by order direct that such conditions shall apply to the employment in day

¹ 1901 Act, s. 56.

² Employment of Women, Young Persons, and Children Act, 1920 (10 & 11 Geo. V. c. 65), s. 2 (1).

³ *Ibid.*, s. 2 (2). The orders are not published as S.R. & O.

shifts of young persons who may lawfully be so employed under the Factory Acts.¹ Where there is non-compliance with the conditions, in the case of a woman or young person, such will be deemed to be employed in contravention of the Factory Act, 1901.²

SECTION 4.—FITNESS FOR EMPLOYMENT OF WOMEN AND YOUNG PERSONS.

SUBSECTION (1).—*Prohibitions on Employment.*

(i) *Women after Childbirth.*

87. An occupier must not knowingly allow a woman or girl to be employed in a factory or workshop within four weeks after she has given birth to a child.³ This section is now administered by the Scottish Board of Health.⁴

(ii) *Children.*⁵

88. Persons under fourteen may not be employed in any industrial undertaking, domestic factories and workshops being excepted.⁶ In the latter, children under twelve may not be employed.⁷

(iii) *Unhealthy Processes.*

89. A young person or child must not be employed in any part of a factory or workshop where the process of silvering mirrors by mercurial process, or of making white lead, is carried on.⁸ A female young person or a child must not be employed in the part of a factory where the process of melting or annealing glass is carried on.⁹ A girl under sixteen must not be employed in a factory or workshop where the making or finishing of bricks or tiles not being ornamental tiles,¹⁰ or the making or finishing of salt, is carried on.¹¹ A child must not be employed in the part of a factory or workshop in which any dry grinding in the metal trade or the dipping of lucifer matches is carried on.¹² Notice of a prohibition contained in the section must be affixed in the factory or workshop to which it applies.¹³

(iv) *Lead Processes.*

90. It is unlawful for any person to employ any woman or young person in (a) work at a furnace where the reduction or treatment of zinc or lead ores is carried on; (b) the manipulation, treatment, or reduction of ashes containing lead, the desilverising of lead, or the melting of

¹ Employment of Women, Young Persons, and Children Act, 1920 (10 & 11 Geo. V. c. 65), s. 2 (3). ² *Ibid.*, s. 2 (5). ³ 1901 Act, s. 61.

⁴ 9 & 10 Geo. V. c. 2, s. 4 (2) (c), (5), Schedule I.

⁵ See also Education (para. 98, *infra*).

⁶ 10 & 11 Geo. V. c. 65, s. 1.

⁷ 1901 Act, s. 62; see *Carty v. Nicoll*, 1878, 6 R. 194.

⁸ Sec. 77 (1).

⁹ Sec. 77 (2).

¹⁰ Sec. 77 (3); see *Squire v. Stanley*, 1901, 65 J.P. 467; 84 L.T. 535.

¹¹ Sec. 77 (3).

¹² Sec. 77 (4); see White Phosphorus Matches Prohibition Act, 1908 (para. 150, *infra*).

¹³ Sec. 77 (5).

scrap lead or zinc; (c) the manufacture of solder or alloys containing more than ten per cent. of lead; (d) the manufacture of any oxide, carbonate, sulphate, chromate, acetate, nitrate, or silicate of lead; (e) mixing or pasting in connection with the manufacture or repair of electric accumulators; or (f) the cleaning of workrooms where any of the above processes are carried on.¹ This prohibition also applies to any other process involving the use of lead compounds in which dust or fumes from a lead compound is produced or the workers are liable to be splashed with a lead compound, unless regulations are complied with providing for exhaust ventilation, periodic medical examination, non-consumption of food, etc. in the room, protective clothing, washing, etc. accommodation, and cleanliness.² In any such process it is unlawful to employ any woman or young person suspended after medical examination.³ Provision is made for the taking and analysis of samples.⁴

91. Employment in contravention of the Act is, in the case of a factory or workshop, an offence punishable under the Factory Act, 1901. A contravention in any other place involves a fine not exceeding £20, and a factory inspector has in relation to such place the same powers and duties as if it were a factory or workshop.⁵

(v) *Lead Painting of Buildings.*⁶

92. Women or young persons cannot lawfully be employed in painting any part of a building (including fixtures) with lead paint. But this does not apply to (a) apprentices in the painting trade under arrangements approved by the Home Secretary, after consultation with organisations, if any, representative of employers and workers in the trade; (b) women or young persons employed in such special decorative work (not of an industrial character) as may be excluded by order; or (c) women employed on 1st January 1927 in any trade involving as part of their occupation such painting as aforesaid.

(vi) *Prohibitions under Regulations for Dangerous Trades.*

93. Regulations for dangerous or unhealthy trades or processes may prohibit the employment of all persons or any class of persons.⁷

SUBSECTION (2).—*Certification of Fitness.*

(i) *Certificate of Fitness.*

94. In a factory a young person under sixteen, or a child, must not be employed for more than seven work days, or, if the certifying surgeon for the district resides more than three miles from the factory, thirteen work days, unless the occupier has obtained a certificate of fitness for

¹ Women and Young Persons (Employment in Lead Processes) Act, 1920 (10 & 11 Geo. V. c. 62), s. 1.

² *Ibid.*, s. 2 (1).

³ Sec. 2 (2).

⁴ Sec. 3.

⁵ Sec. 5.

⁶ Lead Paint (Protection against Poisoning) Act, 1926 (16 & 17 Geo. V. c. 37), s. 2.

⁷ 1901 Act, s. 83 (a).

employment in that factory. When a child becomes a young person a fresh certificate is required. A certificate must be produced, at the factory, on the demand of an inspector.¹

(ii) *Regulations regarding Certificates.*²

95. The certificate must be one granted by the certifying surgeon, after personal examination at the factory unless there are fewer than five young persons and children there, or for some special reason allowed in writing by an inspector. The certificate must be to the effect that the surgeon is satisfied by production of birth certificate or other sufficient evidence as to age, and has personally examined the person and found the person not incapacitated by disease or bodily infirmity for working daily for the time allowed by law in the factory named. Where a certificate is qualified by conditions as to the work on which the person is fit to be employed, the employment must be in accordance with these conditions. A surgeon has the powers of an inspector to examine any process in which it is proposed to employ the person. The certificate may cover all factories occupied by the same employer in the district of the certifying surgeon. The certificate of birth may be obtained either from a registrar or an education authority.³ A certificate of fitness granted without production of a birth certificate may be annulled by an inspector if he has reasonable cause to believe the age to have been overstated. A surgeon must, when required, give in writing and sign the reasons for refusal of a certificate of fitness.

(iii) *Certificates for Employment in Workshops.*

96. It is in the option of the occupier of a workshop to obtain certificates of fitness of young persons under sixteen, and children, for employment in his workshop.⁴ The prohibition of employment without certification may be extended by order to any class of workshops where it appears to the Home Secretary expedient, on account of special circumstances, for health. Orders may be rescinded without prejudice to the making of new orders.⁵

(iv) *Suspension of Incapacitated Young Persons.*⁶

97. If an inspector thinks a young person under sixteen or a child is, by disease or bodily infirmity, incapacitated for full daily work, and serves a notice on the occupier requiring suspension of the employment from a time not less than one nor more than seven days from service of the notice, the occupier may not continue to employ the subject of the notice (in spite of a previous certificate of fitness) unless the certifying surgeon has, after the service of notice, personally examined and certified the young person or child to be not so incapacitated.

¹ 1901 Act, s. 63.

² Sec. 64.

³ Secs. 64 (8), 134.

⁴ Sec. 65.

⁵ Sec. 66 ; see S.R. & O. 1906, No. 680, p. 177.

⁶ Sec. 67.

SECTION 5.—EDUCATION OF CHILDREN.

98. Part III. of the principal Act provides for (1) an obligation on the parent of a child employed in a factory or workshop to arrange for its half-time attendance at a recognised efficient school;¹ (2) prohibition of employment of a child in a factory or workshop without a certificate of such attendance;² (3) in certain cases payment of fees by the occupier;³ (4) the employment, as a young person, of a child of thirteen, on obtaining exemption from attendance at school under the Education (Scotland) Act, 1901.⁴

99. By the Education (Scotland) Act, 1918,⁵ the school attendance age is prospectively raised to fifteen, and it is (also prospectively) provided⁶ that no child or young person under fifteen who has not been exempted under the Act of 1901 from the obligation to attend school shall be employed in any factory or workshop. The "appointed day" for these changes has not yet been fixed. Meanwhile, under the Employment of Women, Young Persons, and Children Act, 1920,⁷ no child (the definition of which is "a person under the age of fourteen years")⁸ may be employed in any "industrial undertaking."⁹ The definition of the latter is so wide as to include all factories and workshops, but domestic factories and workshops are excepted.¹⁰ Accordingly, it would appear that the only application which Part III. of the Factory Act could now have would be to children employed in domestic factories and workshops, and it is therefore not proposed to examine Part III. in further detail. Part III. is not, however, repealed.

SECTION 6.—DANGEROUS AND UNHEALTHY INDUSTRIES.

SUBSECTION (1).—*Notification of Industrial Diseases.*¹¹

100. Every medical practitioner who believes a patient to be suffering from lead, phosphorus, arsenical, or mercurial poisoning, or anthrax contracted in any factory or workshop [or lead poisoning contracted by any woman or young person in processes involving the use of lead compounds, whether carried on in factories or workshops or not¹²] must (unless a previous notice under this section has been sent) send to the Chief Inspector of Factories at the Home Office a notice stating the name and address of the patient, and the disease, for which notice he is entitled to a fee. Failure to notify involves a maximum fine of forty shillings. The Home Office must then notify the district inspector and certifying surgeon, and the provisions of the Act relating to notice and investigation of accidents¹³ apply to such a case as if it

¹ 1901 Act, ss. 68, 159 (1).

² Sec. 69.

³ Sec. 70.

⁴ Secs. 71, 159 (7).

⁵ 8 & 9 Geo. V. c. 48.

⁶ *Ibid.*, s. 17.

⁷ 10 & 11 Geo. V. c. 65.

⁸ *Ibid.*, s. 4.

⁹ Sec. 1 (1).

¹⁰ Sec. 4.

¹¹ 1901 Act, s. 73.

¹² Women, etc. (Employment in Lead Processes) Act, 1920 (10 & 11 Geo. V. c. 62), s. 4.

¹³ See para. 40 *et seq.*, *supra*.

were an accident. This section may be extended by order to any other disease.¹

SUBSECTION (2).—*Special Regulations and Restrictions.*

(i) *Ventilation by Fan.*²

101. If, in a factory or workshop where grinding, glazing, or polishing on a wheel or any process is carried on by which dust or any gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent (*i.e.* injurious in the long run ³), it appears to an inspector that inhalation could be greatly prevented by a fan or other mechanical means, he may direct the provision of such within a reasonable time.

(ii) *Lavatories and Meals.*

102. Where lead, arsenic, or other poisonous substance is used, suitable washing conveniences must be provided for the employees in the department.⁴ Where such substances are used so as to give rise to dust or fumes, a person may not take a meal, or remain during a meal time, in a room where such substance is used, and provision must be made for taking meals elsewhere.⁴ This section does not apply to men's workshops.⁵

103. A woman, young person, or child must not be allowed to take a meal or remain during meal times in the following factories or workshops or parts: (a) in glass works, where the materials are mixed; (b) in glass works where flint glass is made, where grinding, cutting, or polishing is carried on; (c) in lucifer-match works, where any manufacturing process or handicraft (except cutting the wood) is carried on; (d) in earthenware works, in a dipper's house, dipper's drying room, or china scouring room.⁶ In case of contravention the employee is deemed to be employed contrary to the Act. Notice of the prohibition must be affixed. The prohibition may be extended ⁷ to any class of factories or workshops, or parts, where the taking of meals appears specially injurious to health, and such extensions may be rescinded.

(iii) *Protection of Women, etc. in Wet Spinning.*⁸

104. A woman, young person, or child must not be employed in any part of a factory where wet spinning is carried on, unless sufficient means are employed and continued for protecting the workers from being wetted, and, where hot water is used, for preventing the escape of steam into the room.

¹ See S.R. & O. 1915, No. 1170, i., p. 252 (toxic jaundice); S.R. & O. 1919, No. 1775, i., p. 710 (epitheliomatous and chrome ulcerations); S.R. & O. 1924, No. 1505, p. 390 (certain poisonings).

² 1901 Act, s. 74.

³ *Hoare v. Ritchie*, [1901] 1 Q.B. 434.

⁴ 1901 Act, s. 75.

⁵ Sec. 157.

⁶ Sec. 78.

⁷ S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 43.

⁸ 1901 Act, s. 76.

SUBSECTION (3).—*Home Office Regulations for Dangerous Trades.*¹(i) *Power to make Regulations.*

105. Where the Home Secretary is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops, is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify it to be dangerous, and may then make such regulations under the Act as appear to be reasonably practicable and to meet the need.² This part of the Act applies to docks, etc., buildings, and private railways.³ Such regulations are for the benefit of employees, and do not themselves give strangers additional grounds for reparation claims.⁴ Very numerous and detailed sets of regulations have been made.⁵

106. The regulations may apply to all the premises where certified dangerous processes, etc. exist, or may come to exist, or to any specified class, and may exempt specified classes, absolutely or conditionally. They may apply to tenement factories and tenement workshops, and may then impose duties on occupiers who do not employ any person, and on owners. They override, and excuse the non-performance of, contracts.⁶ They may (a) prohibit the employment of, or modify or limit the period of employment of, all persons or any class of persons in any certified dangerous process, etc.; (b) prohibit, limit, or control the use of any material or process; (c) modify or extend any special regulations for any class of factories or workshops contained in the Act.⁷

(ii) *Procedure.*

107. The Home Office publishes, in such manner as appears best adapted to inform the persons affected, notice of proposed regulations, the place where the draft may be obtained, and the time (not less than twenty-one days) for objections. Objections must be in writing, be specific, and contain the deletions and modifications suggested. Agreement is usually reached after consultation with employers' and workers' organisations, the Home Secretary having power to amend. Where he does not amend or withdraw, he must, except in frivolous objections, direct the holding of a public inquiry,⁸ by a competent person, at which the chief inspector and others interested may be represented, and witnesses may be examined on oath, and which is conducted according to rules.⁹ Either House of Parliament, within forty days after the

¹ See also Women and Young Persons (Employment in Lead Processes) Act, 1920; Anthrax Prevention Act, 1919; Police, Factories, etc. (Miscellaneous Provisions) Act, 1916 (Welfare Orders); Celluloid and Cinematograph Film Act, 1922 (12 & 13 Geo. V. c. 35).

² 1901 Act, s. 79.

³ Secs. 104–106.

⁴ *O'Brien v. Arbib*, 1907 S.C. 975.

⁵ See Index to S.R. & O., 1927, Factory and Workshop, 4 (d); and Redgrave, *Factory Acts*, 13th ed., 1924, pp. 317–452.

⁶ 1901 Act, s. 82.

⁷ Sec. 83.

⁸ Sec. 80.

⁹ Sec. 81. For Rules see S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 58.

regulations have been laid before it, may annul all or any of them. In such case the Home Secretary may withdraw the whole set, if he thinks fit, but may bring forward new proposals.¹

(iii) *Penalties for Breach.*²

108. Any occupier, owner, or manager, who is bound to observe, but contravenes or fails to comply with, any regulation is liable for each offence to a maximum fine of £10, and in a continuing offence £2 per day of continuation after conviction. Any other person, so bound but contravening, is liable for each offence to a maximum fine of £20, and the occupier is also liable to a maximum fine of £10, unless he proves that he has taken all reasonable means by publishing and, to the best of his power, enforcing the regulations to prevent the contravention or non-compliance.

(iv) *Publication of Regulations when made.*³

109. Notice of the making and place of purchase of copies is made in the *Gazettes*. Printed copies of all regulations in force must be kept conspicuously posted in the premises to which they apply, and the occupier, on application by any person affected, must furnish a printed copy, under a maximum penalty of £10. Injuring or defacing regulations or notices thereunder involves a maximum fine of £5. Regulations in force for the time being shall be judicially noticed.

SECTION 7.—SPECIAL MODIFICATIONS FOR PARTICULAR PREMISES.

SUBSECTION (1).—*Tenement Factories.*⁴

(i) *Duties of Owner.*⁵

110. “Owner” means the person for the time entitled to receive or who would, if the same were let, be entitled to receive the rents of the premises, and includes a trustee, factor, tutor, or curator, and in case of public or municipal property applies to the persons to whom the management thereof is entrusted.⁶ The owner, in the case of a tenement factory, whether or not an occupier, is liable instead of the occupier for observance of the provisions of the Act relating to (i) cleanliness, freedom from effluvia, overcrowding, and ventilation of factories,⁷ including limewashing and washing so far as relating to any engine-house, passage, or staircase let to more than one tenant; (ii) fencing of machinery, and penal compensation for neglect, in a factory,⁸ except as regards parts of machinery supplied by the occupier; (iii) affixing of certain notices as to children; (iv) the prevention of

¹ 1901 Act, s. 84.

² Sec. 85.

³ Sec. 86.

⁴ For definition see para. 7, *supra*.

⁵ 1901 Act, s. 87.

⁶ Sec. 159 (14); and Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 3.

⁷ 1901 Act, s. 1.

⁸ Secs. 10, 136.

inhalation of dust, etc.,¹ so far as that provision requires supply of pipes, etc. necessary for working the fan or other means of exhaust ventilation; (v) affixing of abstract and notices,² but an occupier may affix in his own tenement the notices regarding children, which then is substituted for the owner's notice as regards the occupier's employees. The power to make orders in the case of dangerous premises³ applies as if the owner were substituted for the occupier. In the case of any tenement factory or class thereof used wholly or partly for weaving cotton cloth, the Home Secretary may, by order, substitute owner for occupier for certain provisions,⁴ or for any order regarding ventilation. In the above cases, summonses, notices, or proceedings are served on the owner in substitution for the occupier.⁵

(ii) *Grinding of Cutlery.*⁶

111. The owner of a non-textile tenement factory where grinding is carried on is responsible for observing the regulations in the Third Schedule to the Act. It is the duty of the owner and occupier respectively to see that such part of the horsing chains and of the hooks to which they are attached as are supplied by them respectively are kept in efficient condition. The owner must provide that there shall at all times be instantaneous communication between each of the work-rooms and both engine-room and boiler-house. Where the owner is responsible, he is substituted for the occupier.⁷

(iii) *Validity of Certificate of Fitness.*⁸

112. A certificate of fitness⁹ of any young person for an employment in a tenement factory is valid for the same employment throughout the factory.

SUBSECTION (2).—*Cotton Cloth and other Humid Factories.*

113. This part of the Act¹⁰ has been greatly changed by the Factory and Workshop (Cotton Cloth Factories) Act, 1911,¹¹ and Regulations made thereunder.¹² These Regulations have effect as if embodied in this part of the Act, and may be substituted for ss. 90–92, 94, and the Fourth Schedule, and where they are substituted the sections cease to apply to cotton cloth factories.¹³ Sec. 91 is practically obsolete, and s. 94 is in effect repealed. The situation therefore is, that cotton cloth factories are under the Regulations of 1911; while other textile factories in which atmospheric humidity is artificially produced by steaming or other mechanical appliances, and which are not regulated under Part

¹ 1901 Act, s. 74.

⁴ Sec. 87 (3); provisions are ss. 7, 94.

⁷ See 1901 Act, s. 135.

⁹ See ss. 63, 64 (para. 81 *et seq.*, *supra*).

¹² S.R. & O. 1911, No. 1259, p. 59.

² Sec. 128.

⁵ Sec. 87 (4).

⁸ Sec. 89.

¹⁰ Secs. 90–96.

¹¹ 1 & 2 Geo. V. c. 21.

¹³ 1 & 2 Geo. V. c. 21, s. 1 (2).

³ Sec. 18.

⁶ Sec. 88.

IV. of the Act¹ as dangerous or unhealthy industries, are subject to s. 90 and the Fourth Schedule (as modified by order)² which prescribe standards of temperature and humidity; s. 92 as to the provision, maintenance, and use of thermometers; and s. 96. As the subject is technical and the Regulations very detailed, more need not be said of these.

114. Both types of factory are subject to s. 93, which provides for notice to the inspector of intention to produce artificial humidity, quarterly visits and reports by the inspector, and notice by the occupier of relinquishment of artificial humidity, and s. 95, which imposes fines of £5 to £10 for a first offence, and £10 to £20 for subsequent offences, in case of failure to remedy acts or omissions within twelve months of notice by the inspector. Fines may not be reduced below the minimum figures.³

SUBSECTION (3).—*Bakehouses*.⁴

(i) *Sanitary Regulations*.⁵

115. It is unlawful to let, suffer to be occupied, or occupy, any room or place as a bakehouse (a) if a water, etc. closet is within or communicates directly with it; (b) unless every cistern for supplying water to it is separate and distinct from a cistern supplying a water-closet; (c) if a drain or pipe for carrying off fæcal or sewage matter has an opening within the bakehouse. Contravention involves a maximum fine of forty shillings, and five shillings per day for continuing after conviction.

116. If a Court of summary jurisdiction, on prosecution by an inspector⁶ or local authority finds that any room or place used as a bakehouse is sanitarily unfit for such use, the occupier is liable to maximum fines of £2 to £5 for first and subsequent offences.⁷ In addition to, or in place of, a fine, the Court may order remedial means to be taken, and if the order is not complied with within the specified time (which may be extended) the occupier is liable to a maximum fine of £1 every day of non-compliance.

117. All inside walls and ceilings or tops of rooms (whether plastered or not) and all passages and staircases must either (a) be painted with oil or varnished or limewashed, or (b) be partly painted or varnished and partly limewashed. There must be three coats of paint or varnish, and it must be renewed every seven years and washed with hot water and soap every six months. Limewashing must be renewed every six months.⁸

¹ *I.e.* under ss. 76, 79.

² See S.R. & O. Rev., 1904, iv. Factory and Workshop, p. 68.

³ *Osborn v. Wood*, [1897] 1 Q.B. 197.

⁴ Secs. 97–100 are now administered by Scottish Board of Health and their inspectors (9 & 10 Geo. V. c. 20, s. 4 (2) (c), and S.R. & O. 1921, No. 1011, p. 296).

⁵ 1901 Act, s. 97.

⁶ See note 4.

⁷ 1901 Act, s. 98.

⁸ Sec. 99.

(ii) *Sleeping Places.*¹

118. A place on the same level as a bakehouse and forming part of the same building may not be used as a sleeping place unless (a) it is effectually separated from the bakehouse by a partition from floor to ceiling, and (b) it has an external glazed window of 9 square feet, of which at least $4\frac{1}{2}$ feet open for ventilation. A person letting or occupying or continuing to let or knowingly suffering to be occupied, any place contrary to the section is liable to maximum fines of £1 and £5, for first and subsequent offences.

(iii) *Prohibition of Underground Bakehouses.*²

119. A bakehouse, any baking room of which is so situate that the floor is more than three feet below the footway of the adjoining street or below the surface of the ground adjoining or nearest, may not be used as a bakehouse unless it (a) was used as a bakehouse at the passing of the Act,³ and (b) has also⁴ been certified by the local authority to be suitable as regards construction, light, ventilation, and in all other respects. Otherwise it is deemed a workshop not kept in conformity with the Act. Refusal by the local authority may be met by application to the Sheriff, who may grant a certificate. Where any place has been let as a bakehouse,⁵ and the certificate cannot be obtained without structural alterations and the occupier alleges on application to the Sheriff that the whole or part of the expense ought to be borne by the owner, the Sheriff may order such payment or apportionment of the expense as appears just and equitable, regard being had to the terms of the contract between the parties,⁶ or in the alternative the Court may, at the request of the occupier, determine the lease.⁷

(iv) *Retail Bakehouses.*⁸

120. The above provisions are enforceable, as regards retail bakehouses, by the local authority instead of a factory inspector. A retail bakehouse is any bakehouse or place, not being a factory, the bread, biscuits, or confectionery baked in which are sold not wholesale, but by retail, in some shop or place occupied together with⁹ the bakehouse. The medical officer of health has the powers of an inspector. Bakehouses which are factories are under the factory inspector, except so far as displaced by the administration of the Scottish Board of Health.¹⁰

¹ 1901 Act, s. 100.² Sec. 101.³ *Schwerzerhof v. Wilkins*, [1898], 1 Q.B. 640.⁴ *Evans v. Gallon*, 1904, 68 J.P. 537.⁵ See *Morris v. Beal*, [1904] 2 K.B. 583.⁶ See para. 26, *supra*.⁷ 1901 Act, s. 101 (8).⁸ Sec. 102.⁹ A business, not geographical, connection; *Glasgow Local Authority v. Waugh*, 1896, 4 S.L.T. 136.¹⁰ See note to title of subsection, *supra*.

SECTION 8.—APPLICATION OF ACT TO PARTICULAR PREMISES
AND PROCESSES.

SUBSECTION (1).—*Laundries*.¹

121. The principal Act, as amended by any subsequent enactment, applies,² subject to the special provisions of the Act of 1907, to laundries carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business,³ or incidentally to the purposes of any public institution,⁴ which laundries are added to the list of non-textile factories.⁵ In the two latter instances the laundry need not be carried on by way of trade or for purposes of gain. Hours of employment of women and young persons are specially regulated, as regards laundries other than those ancillary to a business carried on in a factory or workshop.⁶ In every laundry, if mechanical power is used, a fan or other efficient means must be provided, maintained, and used for regulating the temperature in every ironing room and carrying away the steam in every washhouse. Stoves for heating irons must be sufficiently separated from any ironing room or ironing table, and gas irons emitting any noxious fumes must not be used. The floors must be kept in good condition and drained, so as to allow the water to flow off freely. Another section deals with home work.⁷

SUBSECTION (2).—*Charitable and Reformatory Institutions*.⁸

122. Where in any premises of a charitable or reformatory institution, not being subject to inspection by or under the authority of a Government department, any manual labour is exercised in or incidentally to the making, altering, repairing, ornamenting, finishing, washing, cleaning, or adapting for sale of articles not intended for the use of the institution, the principal Act, subject to the provisions of the 1907 Act, applies to these premises, notwithstanding that the work there is not by way of trade or for purposes of gain, or that the workers are not under contract of service or apprenticeship.⁹

123. But if the Home Secretary is satisfied by the managers of the institution that the only workers are inmates of and supported by the institution, or supervisors of work or managers of machinery, and that the work is carried on in good faith for the support, education, training or reformation of the workers, he may by order direct that so long as the order is in force the principal Act shall apply to the institution

¹ 1901 Act, s. 103, repealed by Factory and Workshop Act, 1907 (7 Edw. VII. c. 39); see ss. 1-4.

² 1907 Act, s. 1. ³ Overruling *Caledonian Rly. Co. v. Paterson*, 1898, 2 Adam 620.

⁴ *Hall v. Derby Sanitary Authority*, 1885, 16 Q.B.D. 163; *Seal v. British Orphan Asylum*, 1911, 104 L.T. 424; *Royal Masonic Institution for Boys v. Parkes*, [1912] 3 K.B. 212.

⁵ Sixth Schedule of 1901 Act, Pt. II.

⁶ 1907 Act, s. 2; see para. 54, *supra*, for details.

⁷ Sec. 4; see Home Work (para. 132 *et seq.*, *infra*).

⁸ Sec. 5.

⁹ Sec. 5 (1).

under the following modifications: (a) Managers may submit a scheme for hours of employment, meals, holidays, and education of children. If approved, the scheme is in substitution for the corresponding provisions of the Act of 1901. Approved schemes are subject to the veto of either House of Parliament. (b) The medical officer of the institution may be appointed certifying surgeon. (c) The provisions of the Act as to affixing abstract and notices will not apply. (d) In reformatory institutions, after notice by managers, an inspector is not to examine an inmate except in presence of a manager, or with consent of the manager or person in charge. (e) The managers are to make annual returns in prescribed form as to managers, inmates, and the employment, under a maximum fine of £5 for non-compliance.¹

SUBSECTION (3).—*Docks, etc.*²

124. A limited application of the principal Act is made in the case of docks,³ wharves,⁴ quays, and warehouses,⁵ and all machinery or plant⁶ used in the process of loading⁷ or unloading or coaling any ship in any dock, harbour, or canal. These are deemed to be "factories," and the purpose for which the machinery, etc. is used is deemed to be a "manufacturing process," as regards (a) power to make orders as to dangerous machines;⁸ (b) accidents;⁹ (c) regulations for dangerous trades;¹⁰ (d) powers of inspectors;¹¹ and (e) fines in case of death or injury.¹² The person who by himself, his agents, or workmen, uses such machinery, etc., for the above purpose is deemed to be the "occupier" of the premises, and for the enforcement of the above provisions the person having the actual use or occupation¹³ of a dock, etc., or of premises within or part

¹ 1907 Act, s. 5 (2).

² 1901 Act, s. 104.

³ Includes a wet dock (*Hanlon v. North City Milling Co.*, [1903] 2 I.R. 163), and a dry dock (*Cattermole v. Atlantic Transport Co.*, [1902] 1 K.B. 204; *Smith v. Standard Steam Fishing Co., Ltd.*, and *Burden v. Gregson & Co.*, [1906] 2 K.B. 275).

⁴ *Haddock v. Humphrey*, [1900] 1 Q.B. 609; *Ellis v. Wm. Cory & Son, Ltd.*, [1902] 1 K.B. 38; *Kenny v. Harrison*, [1902] 2 K.B. 168.

⁵ Warehouse—*Green v. Britten & Gilson*, [1904] 1 K.B. 350; not a warehouse—*Colvine v. Anderson & Gibb*, 1902, 5 F. 255; *Burr v. W. Whiteley, Ltd.*, 1902, 19 T.L.R. 117; *Buckingham v. Fulham Corporation*, 1905, 21 T.L.R. 511; *McEwan v. Perth Corporation*, 1905, 7 F. 714. See also *Moreton v. Reeve*, [1907] 2 K.B. 401.

⁶ *Medd v. M'Iver and Durrie v. Warren*, 1899, 15 T.L.R., pp. 364, 365 (gangway doors and staging not machinery or plant). Includes ship's own tackle—*Stuart v. Nixon*, [1901] A.C. 79; *Reid v. Anchor Line*, 1903, 5 F. 435.

⁷ *Stuart v. Nixon*, *supra* (replacing hatchway beams included).

⁸ 1901 Act, s. 17; see para. 38, *supra*.

⁹ See para. 40 *et seq.*, *supra*.

¹⁰ Sec. 79; see para. 100 *et seq.*, *supra*.

¹¹ 1901 Act, s. 119.

¹² Sec. 136.

¹³ Affirmative—*Jackson v. Rodger*, 1899, 1 F. 1053; *Merrill v. Wilson*, [1901] 1 Q.B. 35; *Hainsborough v. Ralli Bros.*, 1901, 18 T.L.R. 21; *Bartell v. Gray & Co.*, [1902] 1 K.B. 225; *Carrington v. Bannister & Co.*, [1901] 1 K.B. 20; *Fogarty v. Wallis & Co.*, [1903] 2 I.R. 522; *Weavings v. Kirk & Randall*, [1904] 1 K.B. 213; *Pacific Steam Navigation Co. v. Pugh & Sons*, 1907, 23 T.L.R. 622. Negative—*Bruce v. Henry*, 1900, 2 F. 717; *Low v. Abernethy*, 1905, 2 F. 722; *Stewart v. Dublin and Glasgow Steam Packet Co., Ltd.*, 1902, 5 F. 57; *Stewart v. Darngavil Coal Co., Ltd.*, 1902, 4 F. 425; *Ramsay v. Mackie*, 1904, 7 F. 106. See also *Smith and Burden (supra)*.

of the same, and the person so using any such machinery or plant, is deemed the "occupier" of a factory. "Plant" includes any gangway or ladder used by any person employed to load, unload, or coal a ship. "Ship" and "harbour" have the same meanings as in the Merchant Shipping Acts.¹

SUBSECTION (4).—*Buildings under Construction or Repair.*²

125. The provisions of the principal Act referred to in the preceding paragraph, (a) to (e), have effect as if (i) any premises on which machinery worked by mechanical power is temporarily used for construction³ of a building⁴ or any structural work in connection with such were included in the word "factory," and (ii) the purpose of use were a "manufacturing process," and (iii) the person who by himself, etc. temporarily uses any such machinery for the above purpose were the "occupier"⁵ of the premises. For enforcement, the person so using any such machinery is deemed the occupier of a factory. The provisions relating to notice and formal investigation of accidents have effect as if (i) any building over thirty feet high⁶ (at time of accident⁷) being constructed⁸ or repaired⁹ by a scaffolding;¹⁰ and (ii) any building over thirty feet high in which more than twenty persons, other than domestic servants, are employed for wages, were included in "factory"; and as if in (i) the employer, and in (ii) the occupier of the building, were the occupier of a factory.

SUBSECTION (5).—*Private Railways.*¹¹

126. Where any line or siding, not being part of a railway within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900¹² ["railway used for the purposes of public traffic, whether passenger, goods, or other traffic, including any works of the railway

¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742. ² 1901 Act, s. 105.

³ *M'Nicholas v. Dawson*, [1899] 1 Q.B. 773.

⁴ See *Stevens v. Gourlay*, 1859, 7 C.B. (N.S.) 99; *Leicester Corporation v. Brown*, 1892, 67 L.T. 686; *Aylward v. Matthews*, [1905] 1 K.B. 343.

⁵ *Purves v. Sterne*, 1900, 2 F. 887.

⁶ *Rixsom v. Pritchard*, [1900] 1 Q.B. 800; *Hoddinott v. Newton, Chambers & Co., Ltd.*, [1901] A.C. 49; *Knight v. Cubitt*, [1902] 1 K.B. 31; *Hariley v. Quick*, [1905] 1 K.B. 359; *Halstead v. Thomson & Sons*, 1901, 3 F. 668 (measured from ground, not foundation); cf. *M'Grath v. Neill & Sons*, [1902] 1 K.B. 211.

⁷ *Billings v. Holloway*, [1899] 1 Q.B. 70.

⁸ *Hoddinott v. Newton, Chambers & Co., Ltd.*, *supra* (altered); *Mason v. A. R. Dean, Ltd.*, [1900] 1 Q.B. 770 (decorated). Even if building actually in use—*M'Cabe v. Jopling and Palmer's Travelling Cradle, Ltd.*, [1904] 1 K.B. 222.

⁹ *Dredge v. Conway, Jones & Co.*, [1901] 2 K.B. 42 (whitewashing ceilings); *Reddy v. Broderick*, [1901] 2 I.R. 328 (painting).

¹⁰ *Hoddinott v. Newton, Chambers & Co., Ltd.*, *supra* (a question of law). Examples, affirmative—*Maude v. Brook*, [1900] 1 Q.B. 575; *Reddy v. Broderick*, *supra*; *Veasey v. Chattle*, [1902] 1 K.B. 494; *Halstead v. Thomson & Sons*, *supra*; *Elvin v. Woodward & Co.*, [1903] 1 K.B. 838; *O'Brien v. Dobbie*, [1905] 1 K.B. 346. Negative—*Marshall v. Reedeforth*, [1902] 2 K.B. 175; *Crowther v. West Riding Window Cleaning Co.*, [1904] 1 K.B. 232; *M'Donald v. Hobbs & Samuel*, 1899, 2 F. 3; *Campbell v. Sellars*, 1903, 5 F. 900.

¹¹ 1901 Act, s. 106.

¹² 63 & 64 Vict. c. 27.

company connected with the railway”¹], is used in connection with a factory or workshop, or with any place to which the principal Act applies, the above provisions, (a) to (e),² shall have effect as if the line or siding were part of the factory or workshop. If it is used in connection with more than one factory or workshop belonging to different occupiers the provisions have effect as if the line or siding were a separate factory.

SUBSECTION (6).—*Buildings being Lead Painted.*³

127. “Lead paint” means any paint, paste, spray, stopping, filling, or other material used in painting which, when treated in a manner prescribed by rules,⁴ made by the Home Secretary, yields to an aqueous solution of hydrochloric acid, a quantity of soluble lead compound exceeding, when calculated as lead monoxide, 5 per cent. of the dry weight of the sample. “Building” includes fixtures.⁵ The Home Secretary may make regulations, as in the case of dangerous trades, under the Act of 1901,⁶ prohibiting the use of certain forms of lead compound, preventing danger from spraying, prohibiting dry rubbing down and scraping, providing for periodical medical examinations, and, where necessary, suspensions from employment, for facilities for washing, protective clothing, and hygienic instruction for workers.⁷

128. The provisions of the principal Act relating to notification of diseases in factories⁸ (so far as relative to lead poisoning), to breaches and publication of regulations,⁹ to powers and duties of inspectors,¹⁰ and Part IX. (legal proceedings) apply in any case where persons are employed in painting buildings, as if the places where they are employed were factories, and as if their employers were occupiers, with such modification as may be made by order.¹¹ The Home Secretary may prescribe particulars to be registered under the Act and returns to be made under a penalty of £3 in case of failure. This does not apply where the employees’ ordinary occupation does not include the painting of buildings.¹² Provision is made for taking samples, and analysis.¹³ The Act applies to employment under the Crown.¹⁴

SUBSECTION (7).—*Domestic Factories and Domestic Workshops.*¹⁵

129. The Act makes special rules for the hours of employment of young persons and children which have already been referred to.¹⁶ The

¹ 63 & 64 Vict. c. 27, s. 16.

² See para. 124, *supra*.

³ Lead Paint (Protection against Poisoning) Act, 1926 (16 & 17 Geo. V. c. 37). See also paras. 90–92, *supra* (Employment of Women, etc. in Lead Processes), and Vehicle Painting Regulations under s. 79 (S.R. & O. 1926, No. 299, p. 537).

⁴ S.R. & O. 1926, No. 1621, p. 551.

⁵ 1926 Act, s. 7.

⁶ See para. 100 *et seq.*, *supra*.

⁷ 1926 Act, s. 1; S.R. & O. 1927, No. 847, p. 441.

⁸ 1901 Act, s. 73.

⁹ Secs. 85, 86.

¹⁰ Secs. 119–121.

¹¹ 1926 Act, s. 3; S.R. & O. 1926, No. 1620, p. 551.

¹² Sec. 4; power not yet exercised.

¹³ Sec. 5.

¹⁴ Sec. 6.

¹⁵ 1901 Act, s. 111; for definition see para. 11, *supra*.

¹⁶ Sec. 111 (1); see para. 56, *supra*.

requirement as to making certain entries and reports where a woman, young person, or child is employed in pursuance of an exception¹ does not apply except as prescribed by the Home Secretary.² The provisions of the principal Act as to certificates of fitness for employment³ apply to a domestic factory as if it were a workshop and not a factory.⁴ The provisions as to (a) simultaneous meal hours and prohibition of employment in meal times,⁵ (b) affixing notices and abstracts;⁶ (c) holidays;⁷ (d) notices of accidents;⁸ (e) ventilation, drainage of floors, and thermometers;⁹ and (f) keeping a general register,¹⁰ do not apply to a domestic factory or a domestic workshop.¹¹ Sec. 1 of the Act (sanitary condition of a factory)¹² does not apply to a domestic factory.¹³ If any process which has been certified as dangerous¹⁴ is carried on in a domestic factory or domestic workshop, all the provisions of the Act apply, as if the place were an ordinary factory or workshop.¹⁵

130. Straw plaiting, pillow-lace making, or glovemaking, or employment incidental thereto, in a private house or private room by the family¹⁶ dwelling therein or any of them, by way of trade or for gain, does not of itself constitute the house or room a workshop within the meaning of the Act. If satisfied of the light character of any handicraft carried on as above, the Home Secretary may extend this provision to such handicraft.¹⁷ Similarly, making an article or part, altering, repairing, ornamenting, or finishing¹⁸ any article, or adapting it for sale, under the above conditions, does not constitute the house or room a workshop, if the labour is at irregular intervals and does not furnish the whole or principal means of living of the family.¹⁹

SUBSECTION (8).—*Quarries.*

131. The Quarries Act, 1895,²⁰ provides that in the application of the Factory Acts, 1878 to 1891, and of any future Act amending the same, to quarries under that Act (a) the powers of factory inspectors are to be transferred to and exercised by inspectors under the Metalliferous Mines Regulations Acts; (b) the sections of the Factory Acts dealing with notice and investigation of accidents are not to apply to quarries; and (c) nothing in [s. 54 of the Act of 1901] shall prevent the employment in any such quarry of young persons in three shifts for not more than eight hours each.²¹

¹ 1901 Act, s. 60; see para. 64, *supra*.

² See para. 87 *et seq.*, *supra*.

³ Para. 59 *et seq.*, *supra*.

⁴ Para. 62, *supra*.

⁵ Paras. 25, 26, *supra*.

⁶ Sec. 111 (4).

⁷ Sec. 111 (5).

⁸ Sec. 112.

⁹ 1901 Act, s. 114 (1); see para. 8, *supra* ("workshop").

¹⁰ Extended to laundries; Factory and Workshops Act, 1907, s. 4.

¹¹ 1901 Act, s. 114 (2).

¹² See, however, Employment of Women, etc. Act, 1920 (para. 140, *infra*).

² Sec. 111 (2).

⁴ Sec. 111 (3).

⁶ Secs. 127, 128.

⁸ Para. 40, *supra*.

¹⁰ Sec. 129; see *infra*, para. 164.

¹² Para. 20, *supra*.

¹⁴ Para. 100, *supra*.

¹⁶ *Beardon v. Parrott*, 1871, L.R. 6 Q.B. 718.

²⁰ 57 & 58 Vict. c. 42, s. 3.

SECTION 9.—HOME WORK (OUTWORKERS).

SUBSECTION (1).—*Keeping of Lists of Outworkers.*¹

132. In the case of persons employed in classes of work specified in Special Orders of the Home Secretary,² the occupier of every factory and workshop, and every contractor employed by the occupier in its business, must (a) keep in prescribed form and with prescribed particulars³ lists showing names and addresses of all persons directly employed by him, either as workmen or contractors, in the business of the factory or workshop, outside it, and the places where they are employed; (b) send copies or extracts to an inspector as required; (c) send copies by 1st February and 1st August to the local authority. The local authority is to examine the lists and notify neighbouring authorities of outworkers in their districts. Lists are open to inspection by factory inspectors and local authorities, and particulars furnished by one authority to another are open to inspection by any factory inspector. This section applies to any place from which any work is given out, and the occupier thereof, and to every contractor employed by the occupier in connection with the work, as if the place were a workshop. Contravention by an occupier or contractor involves maximum fines of £2 and £5 for first, and second or subsequent offences.

SUBSECTION (2).—*Unwholesome Premises.*⁴

133. If the local authority for a place where work is carried on for the purpose of or in connection with the business of a factory or workshop, notifies the occupier of the factory or workshop, or contractor, in writing, that the place is injurious or dangerous to the health of the workers, the occupier or contractor, if, after one month from the notice, he gives out work to be done there, and the place is found by the Court to be injurious or dangerous, is liable to a maximum fine of £10. The section applies in the case of an occupier as if the place of giving out were a workshop, but it only applies in the case of persons employed in such classes of work as the Home Secretary may specify by Special Order.⁵

SUBSECTION (3).—*Infectious Diseases in Places of Home Work.*⁶

134. If the occupier or contractor (as above) causes or allows wearing apparel to be made, cleaned, or repaired in any dwelling-house or building occupied therewith while any inmate of the house is suffering from scarlet fever or smallpox then, unless he proves he was not

¹ 1901 Act, s. 107.

² S.R. & O. 1911, No. 394, p. 64; S.R. & O. 1912, No. 158, p. 150; S.R. & O. 1913, No. 91, p. 160.

³ Official Form 44; S.R. & O. 1911, No. 394, p. 64.

⁴ 1901 Act, s. 108.

⁵ For orders see note to preceding para.

⁶ Secs. 109, 110. Administered by Scottish Board of Health (9 & 10 Geo. V. c. 20, s. 4 (2) (c), and S.R. & O. 1921, No. 1011, p. 296).

aware, and could not reasonably be expected to be aware, of the illness, he is liable to a maximum fine of £10.¹ If any inmate of a house is suffering from a notifiable infectious disease,² the local authority may by order forbid any work (making, cleaning, washing, altering, ornamenting, finishing, and repairing of wearing apparel and any work incidental thereto, and such other work as may be specified by Special Order³) to be given out to any person living or working in that house or part thereof, and the order may be served on the occupier of the factory, etc.; or contractor. The local authority's order may be made though the sick person has been removed, and it may be either for a specified time, or until the house, etc. has been disinfected to the satisfaction of the medical officer of health. Two members of the authority, on the advice of the medical officer, may, in urgent cases, issue the order. An occupier or contractor contravening the order after service is liable to a maximum fine of £10.⁴

SECTION 10.—PARTICULARS OF WORK AND WAGES.

SUBSECTION (1).—*Piece-workers, Textile Factories.*⁵

135. To enable piece-workers to compute the wages due to them, the occupier of a textile factory must publish particulars of the rate of wages applicable to the work, and particulars of the work to which the rate is to be applied. As regards weavers in the worsted and woollen (not hosiery) trades, the particulars must be furnished to a weaver, in writing, when the work is given out to him, and also exhibited on a separate and legible placard. The same applies to weavers in the cotton trade, but the placard must contain the basis and conditions by which the prices are regulated and fixed. For every other worker the particulars of the rate applicable to the work to be done by each worker must be furnished in writing when the work is given out to him, but if the same particulars are applicable to all the workers in one room a placard is sufficient. Such particulars of the work to be done as affect the amount of wages must, except where ascertainable by automatic indicator (as to which detailed instructions are given), be furnished in writing when the work is given out. No particulars may be expressed by symbols.

136. An occupier failing to comply with the section or fraudulently using a false indicator, or a workman fraudulently altering an indicator, is liable to a maximum fine of £10 for each offence, and for a subsequent offence within two years from the last conviction a fine of not less than £1.⁶ But an indicator is not deemed false if it complies with the requirements of the section. If a worker, for the purpose of divulging a trade secret, discloses particulars given to him or to a fellow-workman, he

¹ 1901 Act, s. 109.

² Infectious Diseases (Notification) Act, 1889, s. 6.

³ The three orders referred to in note to para. 132.

⁴ 1901 Act, s. 110.

⁵ Sec. 116 (1); not applicable to men's workshops (s. 157).

⁶ Sec. 116 (2)–(4).

is liable to a maximum fine of £10, and a similar fine is imposed on any one who, for the purpose of obtaining knowledge of or divulging a trade secret, solicits or procures an employee in a factory to disclose particulars, or with that object bribes or causes to be bribed any such employee. It is no defence, where particulars supplied are false, to shew that the workman could easily have ascertained their falsity.¹

SUBSECTION (2).—*Extension to Non-textile Factories and to Workshops.*²

137. The Home Secretary, on report of an inspector, may apply the above provisions to any class of non-textile factories, or any class of workshops, by Special Order,³ subject to necessary modifications; or to any class of outworkers and employers of outworkers. Extension to outworkers employed in a business carried on in a men's workshop is incompetent.⁴

SUBSECTION (3).—*Inspection of Weights and Measures.*⁵

138. The Acts for the time being in force relating to weights and measures⁶ (which apply to buying and selling) are extended to weights, measures, scales, balances, steelyards, and weighing-machines used in a factory or workshop in checking or ascertaining the wages of employees, and the powers and duties of inspectors of weights and measures extend to these premises.

PART III.—ADDITIONAL ENACTMENTS SINCE 1901.

SECTION 1.—INTRODUCTORY.

139. Some of these, or portions of them, have already been treated under Part II., where they amend, or have a direct bearing upon, topics treated in that Part. In so far as they introduce new matter, they are dealt with here, except as bearing upon administration (Part IV.).

SECTION 2.—EMPLOYMENT OF CHILDREN.

140. Reference has been made to the prohibition of employment of children in any "industrial undertaking" contained in the Employment of Women, Young Persons, and Children Act, 1920⁷ (domestic factories and domestic workshops being excepted). Prior to that Act, and after the principal Act of 1901, the Employment of Children Act, 1903,⁸

¹ *Nussey v. Birtwhistle*, 1894, 58 J.P. 735.

² 1901 Act, s. 116 (5).

³ Fifteen orders have been made; see Index to S.R. & O. 1927, and Redgrave, *Factory Acts*, 13th ed., 1924, pp. 154–181.

⁴ *Seal v. Alexander*, [1912] 1 K.B. 1469.

⁵ 1901 Act, s. 117.

⁶ *Weights and Measures Acts*, 1878 to 1904.

⁷ 10 & 11 Geo. V. c. 65, s. 1 (1); see paras. 17, 49, 88–90, 98–99, *supra*; and following section.

⁸ Repealed as to England.

introduced general restrictions on the employment of children, without reference to premises, and gave local authorities powers to make bye-laws (see CHILDREN AND YOUNG PERSONS ¹). Such bye-laws were not to apply to children over twelve employed under the Factory Acts, which in effect now means employed in domestic factories and domestic workshops. The Act of 1903 is certainly affected by the general prohibition in the Act of 1920, but it may apply (a) to children in domestic factories and domestic workshops (except as to bye-laws), and (b) to children in employments outside the scope of "industrial undertaking."

SECTION 3.—EMPLOYMENT OF WOMEN, YOUNG PERSONS, AND CHILDREN ACT, 1920.

SUBSECTION (1).—*Definitions.*

141. "Child" means a person under fourteen. "Young person" means a person who has ceased to be a child and is under eighteen. "Woman" means a woman of the age of eighteen and upwards.² "Industrial undertaking," with reference to employment of the above, includes particularly (a) mines, quarries, and other works for the extraction of minerals from the earth; (b) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up, or demolished, or in which materials are transformed, including shipbuilding, and the generation, transformation, and transmission of electricity and motive power of any kind; (c) construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gaswork, waterwork, or other work of construction, as well as the preparation for or laying the foundations of any such work or structure; (d) transport of passengers or goods by road or rail or inland waterway, including the handling of goods at docks, quays, wharves, and warehouses, but excluding transport by hand.³ The Act also applies to ships.⁴

SUBSECTION (2).—*General Prohibitions and Regulations.*

142. No child must be employed in any industrial undertaking,⁵ but undertakings in which only members of the same family are employed are excepted,⁶ and this prohibition does not apply to work done by children in technical schools, if approved and supervised by public authority.⁷ No young person or woman may be employed at night in any public or private industrial undertaking or in any branch thereof, except as permitted under the conventions.⁸ "Night" means a period of at least eleven consecutive hours, including the interval

¹ Vol. III. p. 298, *ante*.

⁴ Sec. 1 and Schedule, Pt. IV.

⁷ Schedule, Pt. I. Art. 3.

² 1920 Act, s. 4.

⁵ Sec. 1 (1).

⁸ Sec. 1 (3).

³ Sec. 4 and Schedule.

⁶ Schedule, Pt. I. Art. 2.

between 10 p.m. and 5 a.m.¹ A register of young persons employed in any industrial undertaking, with dates of birth, of entering and leaving the employment, must be kept and be open to inspection.² These prohibitions and regulations, so far as relating to factories and workshops, have effect as if they formed part of the Factory Acts,³ but nothing in this Act applies to domestic factories or domestic workshops.⁴ It should be noted that the relaxations permitted by this Act are not in derogation of any of the provisions of any other Act restricting the employment of women, young persons, or children.⁵ It would seem, therefore, that this Act extends the restrictions of the Factory Acts, but that its permissions do not mitigate these restrictions, by enlarging the exceptions permitted by the Factory Acts. This result is a curious one, and was perhaps not intended, but it seems to follow from the words used.

SUBSECTION (3).—*Permissible Night Work of Young Persons.*⁶

(i) *Continuous Processes.*

143. Young persons over sixteen may be employed by night on work which, by reason of the nature of the process, is required to be carried on continuously day and night, in (a) manufacture of iron and steel, in a process in which reverberatory or regenerating furnaces are used, and galvanising of sheet metal or wire (except the pickling process); (b) glass works; (c) manufacture of paper; (d) manufacture of raw sugar; (e) gold-mining reduction work.⁷

(ii) *Emergencies.*

144. The prohibition of night work does not apply to young persons between sixteen and eighteen in cases of emergency which (a) could not have been controlled or foreseen; (b) are not of a periodical character; and (c) interfere with the normal working of the undertaking.⁸ It is subject to suspension by the Government for such persons where in case of serious emergency the public interest demands it.⁹

SUBSECTION (4).—*Permissible Night Work of Women.*¹⁰

145. Women may be employed on night work (a) in cases of *force majeure*—interruptions of work impossible to foresee and not of a recurring character;¹¹ and (b) where raw materials or materials in course of treatment, which are subject to rapid deterioration, demand night work to preserve them from loss.¹² The night period may be reduced to ten hours on sixty days per year in seasonal trades, and in all cases where exceptional circumstances demand it.¹³

¹ 1920 Act, Schedule, Pts. II. and III.; cf. para. 80, *supra*.

² Sec. 1 (4).

³ Sec. 1 (6).

⁴ Sec. 3 (2).

⁵ Sec. 3 (1).

⁶ Convention; Schedule, Pt. II.

⁷ Art. 2.

⁸ Art. 4.

⁹ Art. 7.

¹⁰ Convention; Schedule, Pt. III.

¹¹ Art. 4 (a).

¹² Art. 4 (b).

¹³ Art. 6.

SECTION 4.—WELFARE ORDERS.¹

146. Where it appears to the Home Secretary that the conditions and circumstances of employment or the nature of the processes carried on in any factory or workshop² are such as to require special provision to be made there for securing the welfare of the workers or any class of workers, he may order the occupier to make a specified provision of the following: arrangements for preparing or heating or taking meals; supply of drinking water; supply of protective clothing; ambulance and first-aid arrangements;³ supply and use of seats in workrooms; facilities for washing; accommodation for clothing; arrangements for supervision of workers.⁴ He may, by Special Order, extend these matters.⁵

147. Orders may be made for particular premises, or a class or group or description; may for particular requirements be made contingent on application by a specified number or proportion of workers, and may prescribe the manner of ascertaining their views; or may, where a proportion of the cost is contributed by workers, provide for their association in the management of facilities ordered. But no contribution may be required of the workers, except for additional or special benefits which the Home Secretary thinks could not reasonably be expected of the employer alone, and unless two-thirds of the workers assent in the prescribed manner.⁶ Otherwise any deductions or payments from workers are forbidden.⁷ If, in the case of a proposed order for particular premises, the occupier, or in the case of a class, etc., the majority of the occupiers, object, the objection shall be referred to a referee in accordance with rules made under the section,⁸ and the Home Secretary may also refer an objection not made by a majority.⁹ Orders may be revoked without prejudice to making further orders.¹⁰ A great number of orders have been made.¹¹

SECTION 5.—FIRST AID AND AMBULANCE, AND SAFETY SUPERVISION ORDERS.¹²

SUBSECTION (1).—*First Aid and Ambulance.*

148. In every factory there must be provided and maintained, so as to be readily accessible, a first-aid box or cupboard, of the prescribed standard,¹³ and where more than 150 persons are employed an additional

¹ Police, Factories, etc. (Miscellaneous Provisions) Act, 1916 (6 & 7 Geo. V. c. 31), s. 7.

² The section does not apply to domestic factories or domestic workshops (s. 7 (8)).

³ See following Section.

⁴ 1916 Act, s. 7 (1), (2).

⁵ Sec. 7 (9); rest rooms added (S.R. & O. 1920, No. 624, I., p. 645).

⁶ Sec. 7 (3).

⁷ Sec. 7 (5).

⁸ Sec. 7 (6); S.R. & O. 1917, No. 742, p. 359.

⁹ Sec. 7 (4).

¹⁰ Sec. 7 (7).

¹¹ See Redgrave, *Factory Acts*, 13th ed., 1924, pp. 452-477; and Index to S.R. & O. 1927, *Factory and Workshop*, I.

¹² *Workmen's Compensation Act*, 1923 (13 & 14 Geo. V. c. 42), s. 29.

¹³ Standards prescribed by Order of 13th December 1923, as amended by Order of 27th June 1927; not S.R. & O. As to quarries, S.R. & O. 1924, No. 282, p. 702.

one for every additional 150 persons or part. Nothing but first-aid requisites and appliances may be kept in the box or cupboard, and it is to be placed under the charge of a responsible person always readily available during working hours, whose name must be posted in every workroom for which a particular box is supplied.¹ If an ambulance room is provided at the factory, and arrangements made to ensure immediate treatment of all injuries there, the chief inspector may exempt the factory from the above requirements so far, and subject to such conditions, as he specifies in a certificate.² The Home Secretary's powers to deal with first aid and ambulance under the Act of 1916³ in Welfare Orders are made exerciseable as respects any works or premises to which any of the provisions of the Factory Acts apply, and such building and engineering operations as may be prescribed, as if they were factories or workshops.⁴

SUBSECTION (2).—*Safety Supervision.*⁵

149. Where, in view of the number and nature of accidents occurring in any factory or class of factories, the Home Secretary thinks special provision should be made in these to secure the safety of workers he may by order require the occupier to make provision for special supervision in regard to safety, investigation of circumstances, and causes of accidents, and otherwise as may be specified in the order.

SECTION 6.—WHITE PHOSPHORUS MATCHES PROHIBITION.⁶

150. It is unlawful for any person to use white phosphorus in the manufacture of matches, and any factory in which it is so used is deemed not to be kept in conformity with the Factory Act.⁷ Occupiers of match factories must at any time allow factory inspectors to take samples for analysis of any material in use or mixed for use. Refusal is obstruction of an inspector in his duties, but the occupier may require the inspector to divide the sample into two parts and mark each and deliver to him one part.⁸ Sale and importation of matches made with white phosphorus are also forbidden.⁹ In view of these prohibitions power is given to the Board of Trade to grant compulsory licenses to use any process patented at the passing of the Act for manufacturing matches without white phosphorus, except safety matches.¹⁰ "White phosphorus" means the substance usually known as white or yellow phosphorus.¹¹

¹ 1923 Act, s. 29 (1).

³ See para. 146, *supra*.

⁵ Sec. 29 (3).

⁶ White Phosphorus Matches Prohibition Act, 1908 (8 Edw. VII. c. 42).

⁷ *Ibid.*, s. 1 (1).

⁸ Sec. 1 (2).

¹⁰ Sec. 4.

² Sec. 29 (1) (*d*).

⁴ Sec. 29 (2).

⁹ Secs. 2, 3.

¹¹ Sec. 5 (2).

SECTION 7.—STORAGE OF CELLULOID AND CINEMATOGRAPH FILMS.¹

151. Premises to which the Factory Acts apply must not be used, unless certain regulations are duly observed,² for keeping or storing raw celluloid (more than 1 cwt., or smaller quantities if not kept in a closed metal box or case) or cinematograph film (more than 20 reels or 80 lbs., or smaller quantities unless each reel is kept in a separate and properly closed metal box or case) in the following circumstances: (a) if the premises are underneath premises used for residential purposes; (b) if a fire occurring therein might interfere with means of escape from the building or adjoining building; (c) where the premises form part of a building, unless such part either (i) is separated from other parts by fire-resisting partitions, ceilings, floors, and self-closing doors, or (ii) is so situated and constructed that a fire there is unlikely to spread to other parts, and its use for the above purposes is sanctioned in writing, and any conditions attached to such sanction are complied with.³ If the Secretary of State for Scotland makes further regulations⁴ as to use in the premises of any cinematograph or other similar apparatus, these must also be complied with.

152. The administration of the Act is in the hands of town and county councils.⁵ There is an appeal to the Sheriff against requirements and refusals to sanction.⁶ The Act does not apply to premises licensed under the Cinematograph Act, 1909. The power of an occupier, under the Factory Act, to exempt himself from fine or conviction of the actual offender⁷ applies to this Act.⁸ The penalties on occupiers are heavy—up to £50, and £10 per day for continuance after conviction. The penalty on employees is a maximum fine of £5.⁹

PART IV.—ADMINISTRATION.

SECTION 1.—CENTRAL AUTHORITIES.

153. The central authorities are the Secretary of State for Home Affairs, generally; the Scottish Board of Health as regards certain sections of the principal Act,¹⁰ and as regards celluloid and cinematograph films the Secretary of State for Scotland.

SECTION 2.—FACTORY INSPECTORS.

SUBSECTION (1).—*Appointment.*

154. Factory inspectors are appointed by the Home Secretary, with Treasury approval as to numbers and salaries.¹¹ A person who is an

¹ Celluloid and Cinematograph Film Act, 1922 (12 & 13 Geo. V. c. 35).

² *Ibid.*, First Schedule.

³ Secs. 1 (1), 2.

⁴ Such regulations made; S.R. & O. 1924, Nos. 363 and 403, pp. 126, 128.

⁵ Secs. 1, 9, 10.

⁶ Sec. 1 (3).

⁷ 1901 Act, s. 141; see para. 173, *infra*.

⁸ 1922 Act, s. 3 (3).

⁹ *Ibid.*, s. 3 (1), (2).

¹⁰ 1901 Act, ss. 61, 97–100, 109, 110; 9 & 10 Geo. V. c. 20, s. 4 (2) (c); and S.R. & O. 1921, No. 1011, p. 296.

¹¹ Sec. 118 (1).

occupier of a factory or workshop, or directly or indirectly interested therein, or in any process or business carried on therein, or in a patent connected therewith, or who is employed in or about such premises, may not act as an inspector.¹ Notices required to be sent to an inspector shall be sent to such inspector as the Home Secretary directs.² The various grades of inspectors are: (1) H.M. Chief Inspector, Home Office, London; (2) H.M. Superintending Inspectors; (3) H.M. Inspectors (districts); (4) H.M. Inspector's Assistants.

SUBSECTION (2).—*Powers.*

155. An inspector, for the purpose of the execution of the Factory Acts, has power to enter, inspect, and examine at all reasonable times, by day and night, a factory and a workshop, and every part thereof, where he has reasonable cause to believe that any person is employed therein, and to enter by day any place which he has reasonable cause to believe to be a factory or workshop.³ "Factory" includes docks, etc.⁴ Powers of entry are restricted in the case of certain reformatory institutions.⁵ The Home Secretary may arrange with a Government department for the inspection of premises, other than a factory or workshop, under the authority of the department, by a factory inspector.⁶ An inspector may also enter any school where he has reasonable cause to believe children employed in a factory or workshop are being educated.⁷ He may take with him into a factory or workshop officers of a local authority.⁸

156. An inspector may require production of registers, certificates, notices, and documents kept in pursuance of the Acts, and inspect, examine, and copy the same,⁹ and generally examine and inquire whether the Public Health and Factory Acts are being complied with.¹⁰ He may also examine, alone or otherwise, any person he finds in a factory, workshop, or school, or whom he reasonably believes to be or have been within the preceding two months employed in a factory or workshop, and require such person to sign a declaration.¹¹ The occupier, his agents, and servants must furnish an inspector with the means of exercising his powers. Inquiry need not be made at the premises.¹²

157. If an inspector reasonably anticipates serious obstruction he may take a constable with him into a factory or workshop.¹³ Wilfully delaying or failing to comply with a requisition under this section, or to produce documents, or concealing or preventing from appearing (or attempting) a woman, young person, or child is deemed obstruction. But no one need answer any question or give any evidence tending to incriminate himself. Any obstructor may be fined £5, and the occupier is also liable to a maximum fine of £5, or for a night offence £20 (in

¹ 1901 Act, s. 118 (5).

² Sec. 118 (8).

³ Sec. 119 (1).

⁴ Secs. 104–106.

⁵ Factory and Workshops Act, 1907, s. 5 (2) (d); see para. 122, *supra*.

⁶ *Ibid.*, s. 6.

⁷ 1901 Act, s. 119 (1) (e).

⁸ Sec. 5 (2).

⁹ Sec. 119 (1) (c).

¹⁰ Sec. 119 (1) (d).

¹¹ Sec. 119 (1) (f).

¹² *Squire v. Sweeney*, 1900, 34 Ir. L.T. 26.

¹³ 1901 Act, s. 119 (1) (b).

a domestic factory, £1 and £5 respectively). Subsequent offences within two years from the last conviction involve a fine of not less than £1 for each offence.¹ An inspector applying for admission to a factory or workshop must, if required, produce his certificate of appointment.²

158. An inspector, if authorised in writing under the hand of the Home Secretary, may, though not a lawyer, conduct or defend in a prosecution or other proceeding, under the Acts or in the discharge of his duty as inspector.³ He need not necessarily produce to the Court his certificate of appointment.⁴

SECTION 3.—CERTIFYING SURGEONS.

159. Subject to such rules as may be made by the Home Secretary, an inspector may appoint a sufficient number of duly registered medical practitioners to be certifying surgeons, and may revoke such appointments, but both actions may be annulled by the Home Secretary upon appeal. The same disqualifications for interest as apply to inspectors apply to certifying surgeons in relation to the particular factory or workshop. The Home Secretary may make rules for their guidance, and as to particulars and forms. If directed by the Home Secretary, they must make any special inquiry and re-examine any young person or child. They must make an annual report.⁵ When there is no certifying surgeon for a factory or workshop, the poor law medical officer for the district shall act for the time being.⁶ In certain charitable institutions the medical officer of the institution is the certifying surgeon.⁷ The certifying surgeon's fees are provided for.⁸

SECTION 4.—POWERS OF LOCAL AUTHORITIES.⁹

160. For their duties with respect to workshops and workplaces under the Factory and Public Health Acts, local authorities and their officers have, without prejudice to their other powers, the powers of factory inspectors.

SECTION 5.—SPECIAL ORDERS OF HOME SECRETARY.¹⁰

161. A Special Order is under the hand of the Home Secretary, and shall be published in the manner he thinks best. It comes into force at date of publication or later date mentioned in the order. It may be temporary or permanent, conditional or unconditional, entire or partial in its effect. It is subject to the veto of either House of Parliament within forty days after being laid before that House. If annulled

¹ 1901 Act, s. (4).

² Sec. 121.

³ Sec. 120.

⁴ *Ross v. Helm*, [1913] 3 K.B. 462.

⁵ 1901 Act, s. 122.

⁶ Sec. 123.

⁷ 1907 Act, s. 5 (2) (b); see para. 122, *supra*.

⁸ 1901 Act, s. 124, Fifth Schedule. Superseded by S.R. & O. 1927, Nos. 692 and 693, p. 445; and S.R. & O. 1913, p. 2353.

⁹ 1901 Act, s. 125.

¹⁰ Sec. 126.

it is of no effect, without prejudice to anything done under it or to the making of a new order. While in force the order applies, so far as consistent with its tenor, as if it were part of the statute under which it was made. After the forty days a Special Order has the effect of a statute, and its validity cannot be questioned, at least as far as questions of faulty procedure are concerned.¹ It appears to be open, however, to exception on the ground of *ultra vires*.²

SECTION 6.—NOTICES, REGISTERS, RETURNS, ETC.

SUBSECTION (1).—*Notice of Occupation*.³

162. Within one month of beginning to occupy a factory or workshop, an occupier must serve on the district inspector a written notice with the name and place of the premises, his postal address, the nature of the work, nature and amount of moving power, and the business name under which business is to be carried on, all under a maximum penalty of £5. The inspector must forward such notice to the local authority.

SUBSECTION (2).—*Affixing of Abstract and Notices*.⁴

163. The following must be affixed, and kept affixed, in every factory and workshop, at the entrance and wherever an inspector directs, in prescribed form and in such position as to be easily read by employees: (a) the prescribed abstract of the Act; (b) the name and address of the prescribed inspector and district certifying surgeon; (c) a notice of the clock, if any, by which times of employment and meals are to be regulated;⁵ (d) other notices and documents required by the Act. Failure to comply involves a maximum fine of £2. These provisions are modified for tenement factories,⁶ and do not apply to domestic factories or domestic workshops,⁷ or men's workshops.⁸ Affixation may be proved by secondary evidence without serving notice to produce the original notice.⁹

SUBSECTION (3).—*General Registers*.¹⁰

164. A "general register" must be kept in the prescribed form, shewing the prescribed particulars as to (a) young persons employed; (b) limewashing; (c) every accident of which notice has to be sent to an inspector; (d) every special exception in force; (e) other matters as prescribed. When the Act requires an entry, one made by or on behalf

¹ *Patent Agents' Institute v. Lockwood*, 1894, 21 R. (H.L.) 61; *Hamilton v. Fyfe*, 1910, 5 Adam 170.

² *Mackey v. Monks*, [1918] A.C. 59, per Lord Chancellor (Finlay), at p. 71; cf. *Patent Agents' Institute v. Lockwood*, *supra*.

³ 1901 Act, s. 127.

⁴ Sec. 128.

⁵ See s. 32 (4).

⁶ Sec. 87.

⁷ Sec. 111.

⁸ Sec. 157.

⁹ *Owner v. Beehive Spinning Co., Ltd.*, [1914] 1 K.B. 105.

¹⁰ 1901 Act, s. 129.

of the occupier is *prima facie* evidence against him of the facts then stated, and absence of entry as to any provision is *prima facie* evidence of non-observance of that provision. The certifying surgeon may inspect the register at any reasonable time. The occupier must give an inspector such extracts as he requires. Failure to comply with these provisions involves a maximum fine of £5. Domestic factories and domestic workshops,¹ men's workshops,² docks, etc.³ are excepted.

SUBSECTION (4).—*Periodical Return of Employees.*

165. An occupier must, by such dates as directed at intervals of not less than one or more than three years (in laundries annually⁴) send to the chief inspector a correct return showing the number, age, sex, and occupation of the persons employed, under a maximum penalty of £10. These provisions apply to factories and workshops and any place to which the provisions of the Act apply.⁵ By the Census of Production Act, 1906,⁶ the Home Secretary is given power to modify the arrangements under this section, and enter into interdepartmental arrangements with the Board of Trade.

SUBSECTION (5).—*Duties of Local Authorities.*

166. Local authorities must keep a register of the workshops in their district.⁷ The medical officer of health, in his annual report to his authority, must report specifically on the administration of the Act in workshops and workplaces, and also send a copy of that part of the report to the Home Secretary.⁸ Where any woman, young person, or child is employed in a workshop where no abstract is affixed, he must give written notice of the omission to the district factory inspector.⁹ Facilities are given for obtaining cheaply birth certificates required for the purposes of the Act.¹⁰

PART V.—LEGAL PROCEEDINGS.

SECTION 1.—OFFENCES AND PENALTIES.

SUBSECTION (1).—*General.*

167. In the preceding pages the penalties for particular contraventions of the principal and other Acts have been stated where they occur. A great number of contraventions, however, fall under four general heads and are visited by the penalty applicable to these heads, as follows. The occupier is, as a rule, primarily liable, but other persons in certain circumstances are made liable either along with him, or in place of him.

¹ 1901 Act, s. 111.

⁴ 1907 Act, s. 5 (2) (e).

⁷ 1901 Act, s. 131.

² Sec. 157.

⁵ 1901 Act, s. 130.

⁸ Sec. 132.

³ Secs. 104–106.

⁶ 6 Edw. VII. c. 49, ss. 5, 10.

⁹ Sec. 133.

¹⁰ Sec. 134.

Repetition of the same kind of offence from day to day does not involve any larger amount than the highest fine under the Act for the offence unless (a) the repetition occurs after a complaint is made for the previous offence; or (b) the offence is employing two or more persons contrary to the Act.¹ There is no definition of "occupier" in the statute, but "it plainly means the person who runs the factory, who regulates and controls the work done there."² In the case of docks, etc., difficult questions may arise as to who is the occupier.³ There seems to be no doubt that a limited company or a statutory company may be prosecuted as an occupier.⁴

SUBSECTION (2).—*Premises not in Conformity with the Act.*⁵

168. If a factory or workshop is not kept in conformity with the Act the occupier is liable to a maximum fine of £10, and in a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence not less than £1 for each offence. In addition to, or instead of, a fine the Court may order the occupier within a specified time to adopt means to bring the factory into conformity, and may extend the time. Failure to comply involves a maximum fine of £1 per day of non-compliance.

SUBSECTION (3).—*Death or Injury arising from a Contravention.*⁶

169. If any person is killed or dies or suffers any bodily injury or injury to health, in consequence of the neglect of an occupier to observe the provisions of the Act or of regulations thereunder, the occupier shall be liable to a maximum fine of £100, and for a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than £1 for each offence. The whole or part of the fine may be applied for the benefit of the injured person or his family or otherwise as the Home Secretary determines. But an occupier is not (a) liable for injury to health unless directly caused by the neglect, or (b) liable at all under this section if a complaint against him for the breach has been heard and dismissed previous to the time when the death or injury was inflicted. This section creates an entirely separate offence from the preceding section and the offence arises from the death or injury.⁷

¹ 1901 Act, s. 143.

² *Ramsey v. Mackie*, 1904, 7 F. 196, per Lord M'Laren at p. 199.

³ See para. 124, *supra*.

⁴ *Chester v. Freeth & Pocock*, [1911] 2 K.B. 832, and *Booth v. Helliwell*, 1914, 78 J.P. 223 (Sale of Food and Drugs Act); *Evans & Co., Ltd. v. London County Council*, [1914] 3 K.B. 315 (Shops Act); *Atkinson v. London and North-Eastern Rly. Co.*, [1926] 1 K.B. 313, and *Lauder v. Barr & Stroud, Ltd.*, 1927, J.C. 60. But see *R. v. Gainsford*, 1913, 29 T.L.R. 359.

⁵ 1901 Act, s. 135.

⁶ Sec. 136.

⁷ *R. v. Taylor*, [1908] 2 K.B. 237.

SUBSECTION (4).—*Employment Contrary to the Act.*

(i) *Liability of Occupier.*¹

170. In such case the occupier⁴ of the factory or workshop is liable to a fine not exceeding £3, or in the case of a night offence £5 (domestic premises, £1 and £2) for each person so employed,² and for subsequent convictions in relation to a factory within two years from the last conviction for the same offence, not less than £1 for each offence. Contravention of the meal-time regulations is deemed employment contrary to the Act.

(ii) *Liability of Parent.*³

171. The parent of a young person or child unlawfully employed is liable to a maximum fine of £1 for each offence, unless the offence was committed without his consent, connivance, or wilful default. Neglecting to cause a child to attend school as required by the Act involves the same penalty.

SUBSECTION (5).—*Forgery, False Declarations, etc.*⁴

172. Any person (a) forging or counterfeiting a certificate (if no other punishment is provided); (b) giving or signing a certificate known to be false in any material particular; (c) knowingly uttering or using (i) such a forged or false certificate, or (ii) as applying to any person, a certificate which does not so apply; (d) personating a person named in a certificate, or an inspector; (e) conniving at any of these offences; (f) wilfully making a false entry in any register or other document under the Act; (g) wilfully making or signing, or knowingly using a false declaration under the Act, is liable to a maximum fine of £20, or imprisonment up to three months, with or without hard labour.

SECTION 2.—PERSONS LIABLE OTHER THAN OCCUPIER.

SUBSECTION (1).—*Actual Offender.*

173. Where an offence for which an occupier is liable is in fact committed by some agent, servant, workman, or other person, that person is liable to the like fine as the occupier.⁵ The occupier, however, is also liable unless he brings the actual offender before the Court on a complaint at the time of hearing the charge and, after the commission of the offence is proved, further proves that he has used due diligence to enforce the Act and that the other person committed the offence without his knowledge, consent, or connivance, in which case the other person shall be convicted and the occupier exempt. The convicted person may also be made to pay costs incidental to the proceedings.

¹ 1901 Act, s. 137.

³ 1901 Act, s. 138.

² See *Fitton v. Wood*, 1875, 32 L.T. 554.

⁴ Sec. 139.

⁵ Sec. 140.

An inspector, however, who is satisfied of these requirements at the time of discovering an offence must proceed against the actual offender without first proceeding against the occupier.¹ Merely to order observance of a provision of the Act is not equivalent to "due diligence."²

SUBSECTION (2).—*Owner of Machine or of Tenement Factory.*

174. Where in a factory the owner or hirer of a machine or implement moved by mechanical power is not the occupier, the owner or hirer is deemed the occupier as regards any offence in relation to a person employed in or about or in connection with that machine or implement.³ The owner of a tenement factory is directly responsible for certain observances,⁴ in place of the occupier.

SECTION 3.—PROCEDURE, ETC.

SUBSECTION (1).—*Jurisdiction.*

175. Offences are prosecuted, and fines recovered, under the Summary Jurisdiction Act, 1908,⁵ before the Sheriff,⁶ at the instance of the Procurator-Fiscal, or an inspector (who may conduct his own case⁷). Summary orders may be made or varied on petition.⁸ Fines are, except as otherwise provided,⁹ payable into the Exchequer.¹⁰ Fines and orders may be enforced by imprisonment up to three months.¹¹ The manager of a firm may competently appear to represent it in Court.¹²

SUBSECTION (2).—*Complaints.*

176. A complaint must be laid within three months after the offence comes to the knowledge of the district inspector, or within two months of the conclusion of a Fatal Accidents Inquiry, but not after six months from the offence. It is sufficient to state that a factory or workshop is such within the meaning of the Act, and to state the name of the ostensible occupier or the firm name by which the occupier employing persons is generally known.¹³

SUBSECTION (3).—*Appeals.*

177. An appeal lies against any order or conviction to the High Court of Justiciary under the Heritable Jurisdiction Act, 1746,¹⁴ but

¹ 1901 Act, s. 141.

² *Rogers v. Barlow & Son*, 1906, 94 L.T. 519; see also *Fotheringham v. Babcock & Wilcox*, 1922, J.C. 60.

³ 1901 Act, s. 142.

⁵ 8 Edw. VII. c. 65.

⁷ Sec. 120.

⁹ See s. 136 (para. 169, *supra*).

¹⁰ Sec. 144.

¹² *M'Alpine & Sons v. Ronaldson*, 1901, 3 Adam 405.

¹³ 1901 Act, s. 146.

⁴ See ss. 87, 88 (para. 110, *supra*).

⁶ 1901 Act, s. 159 (5).

⁸ Sec. 159 (21).

¹¹ Sec. 159 (22).

¹⁴ Sec. 159 (27).

this is virtually superseded by appeal by Stated Case under the Act of 1908.

SUBSECTION (4).—*Evidence.*

178. A prosecuting inspector is a competent witness.¹ A person found in a factory or workshop, except at meal times or while all the machinery is stopped, or solely for bringing food to employees between 4 and 5 p.m. is, until the contrary is proved, deemed to be employed in the premises. This applies only to actual workrooms in the premises. It does not apply to domestic factories or domestic workshops.² The onus of disproving apparent age of a young person lies on the respondent, and a declaration of belief as to age by a certifying surgeon is admissible.³ A Sheriff-Clerk is empowered to give an inspector a certified copy of a conviction for an offence against the Act, on written request and payment of one shilling.⁴

SUBSECTION (5).—*Service of Documents.*⁵

179. This may be made by posting or delivery to the residence, or, upon an owner, by delivery to his agent, or, upon an occupier, by delivery to his agent, or to some person in the factory or workshop. If required to be served on or sent to the occupier, it is sufficient to address it to "the occupier" at the proper postal address of the factory or workshop.

¹ 1901 Act, s. 159 (23).

⁴ Sec. 147 (4).

² Sec. 147 (1).

⁵ Sec. 148.

³ Sec. 147 (2), (3).

FACTORY AND COMMISSION.

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SECTION 1.—DESCRIPTION OF DEED.

180. A factory is a deed by which one authorises another to exercise a right or rights in his place. The word commission used to be applied to such a deed when the powers conferred were of higher importance than usual, but now factory and commission are practically synonymous. The corresponding English term, power of attorney, is now frequently used in Scotland where the powers granted by the deed are not intended to be confined to Scotland.

181. A factory may be (1) general, conferring none but the most ordinary powers of administration; or (2) special, authorising the performance of a particular act or acts; or (3) general and special, in which the general powers are limited by special restrictions, or, as is more usual, the special powers extend the factor's general authority. The factory is not a divestiture, and even during its subsistence the constituent may act for himself.

SECTION 2.—USUAL CLAUSES.

182. The clauses of a factory are usually these: (1) the narrative clause, expressing the cause of granting; (2) the nomination of the factor or factors; (3) the clause or clauses containing the general or special powers, or both; (4) a declaration that the factor's deeds shall be valid, and that the factory shall subsist until recalled; (5) an obligation upon the factor to account; (6) the clause of registration; (7) the testing clause.¹

SECTION 3.—WHEN SPECIAL POWERS NECESSARY.

183. Special powers must be conferred on the factor to enable him: (1) to sell or alienate heritage or valuable moveables; ²

¹ Bell, Convey. i. 447; Juridical Styles, ii. 766; Scots Style Book, ii. 132; Menzies, Convey., ed. Sturrock, p. 413; Wood, Convey. 675.

² Stair, i. 12, 15; Ersk. iii. 3, 39; Bell, Convey. i. 448; *Thomas v. Walker's Trs.*, 1829, 7 S. 828.

- (2) to purchase or feu land or to purchase valuable moveables; ¹
- (3) to serve anyone as heir, ² or to enter vassals; ³
- (4) to compromise claims, ⁴ and to arbitrate; ⁵
- (5) to grant leases; ⁵
- (6) to remove tenants if they do not derive their possession from the factor; ⁶
- (7) to borrow money on behalf of the constituent, and to bind him personally for repayment, or to dispoise his estate in security; ⁷
- (8) to delegate his powers; ⁸
- (9) to grant a proper servitude or other permanent right. ⁹

SECTION 4.—TERMINATION OF FACTORY.

184. The factory is terminated by

- (1) Expiry of the time fixed, or performance of the act or acts authorised.
- (2) Formal recall or the granting of a similar factory to another person. ¹⁰
- (3) Bankruptcy of the constituent. ¹¹
- (4) Supervening incapacity of the constituent is stated by Mr Bell ¹² to terminate the factory. But this is not necessarily the case, especially if the incapacity be of short duration; ¹³ and in any event *bona fide* contracts made by third parties in ignorance of the incapacity are apparently binding. ¹⁴
- (5) Death of the constituent or of several constituents acting jointly. ¹⁵ But the factor is entitled to act until he receives authentic information of his constituent's death. ¹⁶

¹ *Stewart v. Johnston*, 1857, 19 D. 1071; Bell, Convey. i. 448.

² 31 & 32 Vict. c. 101, s. 29; *Gifford v. Gifford*, 1834, 12 S. 421; and see *Moller v. Riddell*, 13th December 1811, F.C.; 1816, 6 Pat. 169.

³ Bell, Convey. i. 448.

⁴ *Hollinworth v. Dunbar*, 21st January 1813, F.C.; *Bridges v. Willison's Trs.*, 1831, 10 S. 43.

⁵ *Livingstone v. Johnston*, 1830, 8 S. 594.

⁶ *York Building Co. v. Carnegie*, 1764, Mor. 4054; *Thomson v. Handyside*, 1834, 12 S. 557; *Crozier v. Downie*, 1871, 9 M. 826; 16 & 17 Vict. c. 80, s. 30; 7 Edw. VII. c. 51, s. 34; see *Park v. Mood* (O.H.), 1919, 1 S.L.T. 170.

⁷ Bell, Convey. i. 448; *Sinclair, Moorhead & Co. v. Wallace & Co.*, 1880, 7 R. 874; but see *Thomson v. Fullarton*, 1842, 5 D. 379, where the factor was allowed to borrow to preserve the estate.

⁸ *Dempster v. Potts*, 1836, 14 S. 521.

⁹ *Macgregor v. Balfour*, 1899, 2 F. 345.

¹⁰ *Walker v. Somerville*, 1837, 16 S. 217; *Heddrington v. Book & Dod*, 1714, Mor. 4047.

¹¹ Bell, Com. i. 525, and see *Broughton v. Stewart, Primrose & Co.*, 17th December 1814, F.C.

¹² Bell, Convey. i. 452.

¹³ *Wink v. Mortimer*, 1849, 11 D. 995.

¹⁴ *Pollock v. Paterson*, 10th December 1811, F.C.; *Menzies, Convey.* 415; Bell, Com. i. 525.

¹⁵ *Stewart v. Baikie*, 1834, 7 W. & S. 211.

¹⁶ *Campbell v. Anderson*, 1826, 5 S. 86; *affd.* 1829, 3 W. & S. 384; *Kennedy v. Kennedy*, 1843, 6 D. 40; *Elliott v. Turquand*, 1881, 7 App. Cas. 79.

- (6) Resignation by the factor. But the constituent must be given due notice of his intention to resign. The factor may be liable in damages for a precipitate resignation.¹
- (7) Death or supervening incapacity of the factor.

SECTION 5.—FACTOR'S REMUNERATION AND DISCHARGE.

185. The factor must account for his intromissions and pay over the balance, after deducting outlays and any salary or commission allowed to him. The office is presumed to be gratuitous when there is no mention of remuneration;² and when remuneration is contemplated but not fixed the Court will settle the amount in the event of disagreement.³ The factor is entitled to a general discharge unless specific objections are stated to his accounts.⁴ When the office is gratuitous the factor is generally liable only for intromissions;⁵ if remunerated, he is responsible for loss due to carelessness or neglect.⁶ The factor must do everything *factoris nomine* or he will be personally liable.⁷

¹ Menzies, Convey.; Bell, Convey., *ubi cit.*

² *Orbiston v. Hamilton*, 1736, Mor. 4063.

³ Menzies, Convey. 416; *Campbell v. Rose*, 1752, Mor. 516.

⁴ *Miln v. Short*, 1879, 6 R. 800; see *Johnstone's Trs. v. Smith Clark* (O.H.), 1896, 4 S.L.T. 180.

⁵ *Fraser's Trs. v. Falconer*, 1830, 9 S. 178.

⁶ *Goldie v. Macdonald*, 1757, Mor. 3537; *Fraser's Trs. v. Falconer*, *supra*.

⁷ *Ainslie v. Arbuthnot*, 1739, Mor. 4065; 1743, 1 Pat. 340.

FACULTIES AND POWERS.

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SECTION 1.—DEFINITIONS.

186. Faculties and powers is a tautological expression which has long been used in the technical language of the law of Scotland to describe what, in more modern phraseology, are called simply powers. A "faculty" is a power.¹ The power which is thus technically designed is a power enjoyed by one person of conferring on others rights in property which does not belong in full fee to the person exercising the power. Every full owner enjoys an unrestricted power of disposal of his property, but that is not a "power" in the sense in which the term is here used; it is merely an integral part of the higher right of *dominium*. Any right, however, vested in a person who is not a full owner, of giving rights in property to another, is a "power" in this sense.

187. The classification of such powers in our law rests upon the degree of restriction imposed upon the person enjoying the power in the exercise thereof; that is to say, upon the limitations imposed either upon his choice of beneficiaries or upon the nature of the rights which he may confer upon them. The terms which are used to describe classes of powers are "disposal," "appointment," and "apportionment"; but in the loose construction given to them these terms have almost ceased to have the clear-cut definitions which would have rendered them useful as means of classification. "Power of disposal" is a phrase apt to describe the power to dispose of property, onerously or gratuitously, without restriction upon the persons to be selected; but the phrase

GENERAL AUTHORITIES.—M'Laren on Wills and Succession, 3rd ed., chap. lx.; Henderson on Vesting, chap. ix.; Sugden on Powers; Farwell on Powers.

¹ Bell's Dictionary, *sub voce* "Faculty." The earliest references to the subject in Scottish legal literature are concerned with the reservation by the granter or disponent of heritable subjects of a power to burden the subjects. In this context the words "power" and "faculty" are used interchangeably or even in conjunction (Stair, ii. 3, 54, and More's Notes, p. cxci. ; Ersk. Inst. ii. 3, 50; iii. 7, 10).

has in practice been used with a much looser signification.¹ It is sometimes used as synonymous with the phrase, "power of appointment," which is more appropriate to describe a power to select from among a restricted class the person or persons who are to take benefit. In the same way, confusion arises from failure to distinguish between the latter phrase and the expression "power of apportionment." "There is," said Lord Dundas, "a complete and radical distinction between a power to apportion or divide a fund among the members of a prescribed class, and an unfettered gift of a fund to such person or persons, in such manner, and in such proportions as the donee of the power may direct or appoint. . . . It is true that the word 'appoint' is often used as equivalent to 'apportion'; but the distinction I have indicated is a real one."² Occasionally a power is construed in the narrow sense of a power to divide the fee, without the additional power to sever the liferent from the fee and to distribute them to different persons;³ but whether this construction is intended must be ascertained from the whole relevant parts of the deed in which the power is conferred. It may probably be said that the scope of a power will be determined by the Courts as a question of construction, without much weight being attached to the original meaning of such words as "appointment" and "apportionment," which may have been used by the draftsman of the deed.

SECTION 2.—RELATION TO TRUST.

188. Since the power authorises the disposal of property by one to whom the property does not belong, there may be two distinct types of power according as the person in whom the power is vested is entitled to use it for his own benefit or not. The former would be a proprietary power, "which entitles the donee to convey the property to himself or to a purchaser if the power can be exercised *inter vivos*, which entitles him to bequeath the property to his own testamentary executor or to any person who is willing to pay a price in return for a prospective legacy, if the power must be exercised by a revocable and *mortis causa* writing. On the other hand, a power of disposal may be of the nature of a trust in the person of the donee."⁴ Examples of both kinds of power may be found in the Reports; but the criteria for distinguishing a proprietary power from a fiduciary power⁵ have not been more clearly determined than by the sound but unhelpful rule that it depends upon the intention of the creator of the power. It is clear that in the case of a "general power"—that is, an unrestricted

¹ As pointed out by Lord Skerrington in *Alexander's Trs. v. Alexander's Trs.*, 1917 S.C. at p. 659.

² *Watt's Trs. v. Jamieson*, 1912 S.C. at p. 1323.

³ *E.g. Mackenzie's Trs. v. Mackenzie*, 1927 S.C. 424.

⁴ Lord Skerrington in *Bannerman's Trs. v. Bannerman*, 1915 S.C. at p. 408.

⁵ Of the former, *Hyslop v. Maxwell's Trs.*, 1834, 12 S. 413, may be an example; of the latter, *Crichton v. Grierson*, 1828, 3 W. & S. 329.

power—the donee may appoint to himself, “he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or his wishes may lead him to do so.”¹ The more common type is the fiduciary power by which a person is entrusted with the right of apportioning a fund among a specified group of persons, such as the members of a family, in the exercise of his discretion.

SECTION 3.—CREATION OF POWER.

189. A power may be created by “reservation” or by “constitution.” The difference depends upon whether the maker of the settlement reserves to himself the power of conferring rights in the property which he is settling or whether he is granting the power to others. There are thus three parties involved in the creation of a power: (1) the creator of the power, who is commonly called the “donor,” although the term is logically applicable only to the case of a power by constitution; (2) the person who is in right of the power, who is commonly called the “donee”—a word subject to the same comment; and (3) the so-called “objects” of the power, being the persons on whom the donee may confer rights by his exercise of the power. It is clear that when the first and second parties are the same person, there is the case of a “reservation” of the power, and when they are different persons, there is a “constitution” of a power, in the sense of these terms above explained.

190. With reference to the “objects” of the power, it may be noted that these may be all the world or may be a restricted class. In the former case the power is a general power of disposal which the donee may exercise in favour of himself or of any other person or persons without limit of choice. If the objects are a limited class, the power is either one of “appointment” (it may be, in specified estates of fee and liferent) among the members (some or all) of that class, or it may be a mere power of “apportionment” or division among the members of the class—that is, without any restriction to liferents, but with the right (by statute²) of excluding some of the class from all share.

191. There is no difference between powers by reservation and powers by constitution in respect either of the rules of construction applicable to them,³ or of the mode of exercising the powers.⁴ There is, however, a difference between the effect of combining a general power of disposal with a right of liferent in the one case and in the other. A general power of disposal when coupled with a liferent will result in a full fee provided that the power is a reserved power, but not if it is a power by constitution. Thus a settler who conferred a liferent upon himself and reserved to himself an unrestricted power of disposal would be held not to have parted with the full fee. The two rights in

¹ Sugden, 8th ed., p. 394.

² See *infra*, para. 204.

³ *Gillon's Trs. v. Gillon*, 1890, 17 R. 435.

⁴ M'Laren on Wills and Succession, s. 2047.

conjunction constitute a fee-simple estate in him. It is otherwise, however, in the case of a liferent and a general power by constitution; the two rights in conjunction do not make a fee when they are conferred by another.¹ Thus, in conferring benefit on another the owner may separate the constituent rights as existing in his beneficiary, but he may not do so while he retains these rights in his own person. It followed that in the case of a liferent and power of disposal by *mortis causa* deed, the fund did not constitute part of the moveable estate of the donee for the purpose of inventory duty, payable on his death, since it was not property belonging to him.²

192. A power may be constituted either by *inter vivos* or by *mortis causa* deed. The former case most frequently arises in marriage contracts. In the case of a power conferred by *mortis causa* deed, the deed "speaks as at the date of death"; and the power does not come into existence until the death of the testator, and cannot, therefore, be exercised prior thereto.³ On the other hand, if the power so conferred may be exercised by will, the will of the donee purporting to exercise the power speaks as from his death, and may thus be an effective exercise of a power conferred subsequent to the execution of the will though prior to the date of the donee's death.⁴ The exercise of the power in such a case is achieved by leaving unrevoked a settlement made before the power was conferred but adapted in its terms to effect such an exercise.

SECTION 4.—COMMON LAW POWERS.

193. In one instance only does the law accord a power independent of any grant or reservation. Since at least the seventeenth century the law of Scotland has recognised as residing in a father the power to apportion among his children a provision destined to them as a class in the marriage contract of their parents.⁵ It is definitely stated by Lord Justice-Clerk Moncreiff that, where an antenuptial contract gives to the children of the marriage a *jus crediti* vested in them as a class, "without any reservation, if there be no division expressed in the contract, the father's power of rational distribution remains."⁶ It is not quite clear from the authorities whether the power resides in the father in his paternal capacity or in virtue of his having provided the funds over which the power extends; but at least it may be said that there is no

¹ McLaren, Wills and Succession, s. 2020. Also opinions in House of Lords in *Morris v. Tennant*, 1855, 27 Sc. Jur. 546; and *Alves v. Alves*, 1861, 23 D. 712.

² *In re Weddell*, 3rd February 1849, Scottish Exchequer Cases.

³ *Penny's Trs. v. Penny's Trs.*, 1925 S.C. 175.

⁴ *M'Tavish's Trs. v. Ogston's Exrs.*, 1903, 5 F. 641, following the leading case of *Hyslop v. Maxwell's Trs.*, 1834, 12 S. 413.

⁵ See Ersk. Inst. iii. 8, 49. Also, as examples, *Edmonston v. Edmonston*, 1706, Mor. 13002, 3219; *James Thomson v. His Children*, 1762, Mor. 13018; *Dowie v. Dowie*, 1728, Mor. 13004; *Ponton v. Ponton*, 1837, 15 S. 554; and per Lord Justice-Clerk Moncreiff in *Moir's Trs.*, 1871, 9 M. 848. Bell would seem to rest this power on implication from the terms of the contract (Prin., ss. 1971 and 1988).

⁶ *Moir's Trs.*, *supra*, at pp. 850, 851.

authority for any common-law power in a mother; and even now, when the abolition of the *jus mariti* and the establishment of equality between the parents has greatly altered the question, it is not likely that the Courts would, by a process of analogical reasoning, recognise such a power even in a mother from whose resources the funds of the children's provision had come. The practical importance of the matter is not great, since the practice of conveyancers has become universal to confer *per expressum* such powers as it is intended that the parents should have.

194. The reference in the passage quoted from Lord Justice-Clerk Moncreiff to a "rational distribution" serves to remind the reader that as at that date a power of appointment was held to be vitiated by the omission of any member of the class among whom the power was to be exercised, and even by the cutting down of the share assigned to one "object" to too exiguous dimensions. The Scottish Courts have not, apparently, been called on to consider whether the statutory enactments about illusory and exclusive appointments are applicable to the common-law power of a father. The statutes¹ in their respective operative provisions are expressed with complete generality: "No appointment . . . shall be invalid . . ."; but in each of them the terms of the preamble show that it was powers conferred by "deeds, wills, and other instruments" which alone were in the contemplation of the Legislature.

SECTION 5.—HOW A POWER IS EXERCISED.

195. If a power is constituted in terms which prescribe the manner of its exercise, it cannot be exercised in default of full compliance with such prescription.² In the absence of any special directions, the power may be exercised by any deed, *inter vivos* or *mortis causa*, revocable or irrevocable. Even a note, signed and holograph, on the margin of the deed which reserved the power was held to operate an effectual exercise.³ If the deed by which the power is exercised is solely devoted to that purpose, or if the exercise, although combined with other purposes, is effected by express reference to the power, no question under this head is likely to arise. But difficulty is occasioned when in a general settlement terms are used which might be held to cover the settler's power over a *res aliena*, but no express reference is made to the power. Thus it has frequently had to be determined whether a general residue clause in a will is effective as an exercise of a power which in fact pertained to the testator, but to which he made no reference in his will. The question, like other questions of testamentary construction, is one of the testator's intention as disclosed by the whole terms of the deed. If the power is a general one, it is of a proprietary character, and will naturally be carried with the general body of the residue without specific mention;⁴

¹ Discussed *infra*, para. 204.

² *Campbell's Trs. v. Campbell*, 1903, 5 F. 366; *Miller's Trs. v. Findlay*, 1896, 24 R. 114. Cf. Farwell on Powers, 3rd ed., p. 197.

³ *Jack v. Rennie*, 1874, 1 R. 828.

⁴ *Bray v. Bruce's Exrs.*, 1906, 8 F. 1078.

but, in the case of a power to appoint among a limited class, the possibility of exercising such a power without express reference to its existence has recently been made the subject of expressions of judicial doubt.¹

196. Cases, however, have occurred in which the most general terms in a residuary clause have been held sufficient to exercise a power which is not referred to in the will. Thus, a lady who had considerable moveable property, and also a power to appoint certain marriage-contract funds among her children, left a holograph will by which, without any reference to those funds, she left "all I possess" to a daughter. This was held to effect an appointment of the whole marriage-contract funds to the daughter, to the exclusion of the son of the testatrix.² The express exercise by a will of one power may create a presumption against the intention to exercise by a general residuary clause another power which is not referred to.³ It is not uncommon to find in a testamentary settlement that the testator conveys to his trustees his whole estate, "including" or "together with" all estate over which he may have a power of disposal (or appointment). Such a clause is quite inaccurate, since (except perhaps in the rare case of an unlimited power of disposal) the estate over which the testator has the power is not part of his estate, and cannot be conveyed by him.⁴ But even in that form a reference to the power may serve to shew that the testator had its existence in mind, and may help the inference that he intended to exercise it by the general residuary provisions of his will.⁵

197. It has long been recognised as a permissible mode of exercising a power to direct that the fund to be appointed shall be divided in the same manner as the residue of the appointer's own estate;⁶ although in making such an appointment it is important to observe that no persons are taking benefit from the residuary clause who are not objects of the power, and that no restrictions are imposed on the enjoyment of any share of residue which are not within the rights of the donee of the power to impose as conditions of an appointment.

198. Where the fund which is subject to the power is held by a body of trustees, it has sometimes happened that the donee of the power, in exercising it by a testamentary settlement, has directed the trustees who hold the fund to denude in favour of his own testamentary trustees. It has been held⁷ that in such circumstances the trustees holding the fund are bound to comply with the direction; although it is not clear what title the donee of a power has to direct the trustees to denude,⁸

¹ *Alexander's Trs. v. Alexander's Trs.*, 1917 S.C. 654; and cases there cited.

² *Tarratt's Trs. v. Hastings*, 1904, 6 F. 968. See doubts expressed in *Dick's Trs. v. Cameron*, 1907 S.C. 1018. Cf. *Buchanan's Trs. v. Whyte*, 1890, 17 R. (H.L.) 53.

³ *Ramsay's Trs. v. Ramsay*, 1909 S.C. 628.

⁴ Cf. Lord Pres. Dunedin in *Montgomerie's Trs. v. Alexander's Trs.*, 1911 S.C. at p. 858.

⁵ The presence of such a clause seems to have turned the scale in *Alexander's Trs. v. Alexander's Trs.*, *supra*.

⁶ E.g. *Mackie v. Mackie's Trs.*, 1885, 12 R. 1230.

⁷ *Dalziel v. Dalziel's Trs.*, 1905, 7 F. 545.

⁸ Even if the direction proceed from the creator of the fund.

nor what protection such a direction could afford to them in an action at the instance of beneficiaries if the funds were subsequently lost or misapplied in the hands of the new body of trustees. The judicial decision in the case noted was doubtless a sufficient authorisation and discharge in the particular case; but other trustees would not be well advised to act on its authority by denuding without judicial authority.

199. The exercise of a power may be partial, and may be renewed from time to time, provided always that there is nothing in the deed creating the power which conflicts with such a rule. In the common case of a parent apportioning a family provision, "he may apportion it at intervals as the exigencies of his family require."¹

SECTION 6.—EXERCISE IN A MARRIAGE CONTRACT.

200. A power may, in the absence of anything to the contrary in the constituting deed, be exercised in a marriage contract. A wife in the enjoyment of the liferent and having a right to appoint the fee "to any person or persons," entered into a post-nuptial contract in which she conveyed to her husband her "whole estate . . . now pertaining and belonging to her, or that shall happen to pertain and belong to her, in any manner of way . . . at the time of her death." It was held that she had exercised her power of disposal, not *mortis causa*, but as from the date of the contract, and that the fee of the appointed funds was *in bonis* of her husband when he predeceased her.² On the other hand, it has been held that a conveyance by a lady in her antenuptial contract of all *acquirenda* would not serve as an exercise of a power of disposal which came to her only subsequently to the execution of the contract.³

SECTION 7.—REVOCABLE AND IRREVOCABLE APPOINTMENTS.

201. The form in which a power is exercised has an important bearing on the question whether the exercise is revocable or not. A testamentary writing is susceptible of revocation or alteration at any time until the death of the testator. It follows that a clause in a will, which is in terms an appointment under a power, shares with the rest of the deed a susceptibility to cancellation or modification by a subsequent testamentary writing.⁴ *Inter vivos* appointments, on the other hand, are commonly made by a formal deed of appointment. The question whether such a deed is revocable seems to depend partly on whether it is gratuitous or contractual, and partly on the use made of it after its execution. Thus, a parent may execute a deed of appointment in favour of a daughter in implement of an obligation undertaken in her marriage

¹ Hatherley L.C. in *Smith Cuninghame v. Anstruther's Trs.*, 1872, 10 M. (H.L.) at p. 47.

² *Buchanan's Trs. v. Whyte*, 1890, 17 R. (H.L.) 53.

³ *Montgomerie's Trs. v. Alexander's Trs.*, 1911 S.C. 856.

⁴ Cf. Farwell on Powers, 3rd ed., p. 241.

contract. This would clearly be an irrevocable appointment. But the exercise in a contractual deed, if invalid, will not be any bar to a subsequent exercise of the power.¹ Probably the deed may also be made irrevocable by delivery to the person in whose favour it has been executed,² and, in the case of heritable property, by infestment following upon it.³ It is possible that even intimation to the appointee might have the same effect.⁴ In the absence of one or other of these features, the deed would probably be revocable. On the other hand, it seems that the use of the word "irrevocable" could not receive effect in a deed which did not leave the custody of the person executing it; but the use of that term coupled with an intimation to the holders of the fund might well be regarded as barring revocation.⁵

202. If the appointment be to a specific part of the divisible estate—as to a particular investment—the result of that part of the estate ceasing to be included in the estate would seem to depend on the state of knowledge of the person making the appointment. If he knows of,—still more, if he is a party to—the altered state of the fund, there operates an ademption of the appointment, precisely as in the case of a legacy.⁶

SECTION 8.—ILLUSORY AND EXCLUSIVE APPOINTMENTS.

203. From the earliest stage of the law of powers it was held that each of a limited class who formed the objects of the power was entitled to a share; in other words, the person entrusted with a power of distributing the fund must distribute it amongst the whole body, and not favour some members of the class to the complete exclusion of others. It followed from this that the Courts would not permit an evasion of the rule against exclusion by an illusory appointment. These rules must, however, be read subject to the important distinction between what were denominated in the English law "exclusive" and "non-exclusive" powers.⁷ The former class contained those which by construction of the constituting deed were read as powers of selecting beneficiaries from among the objects of the power, with the corresponding right of omitting some of the class entirely. To this type of power the rules about the invalidity of exclusive and illusory appointments had no application. The "non-exclusive" type of power, which was regarded as the normal type in family settlements, introduced the strict rules that no object must be omitted and no object must be put off with an illusory share.

¹ *MacGillivray's Trs. v. Watson's Trs.*, 1911 S.C. 1103.

² *Wylie's Trs. v. Wylie*, 1902, 10 S.L.T. 395.

³ *Murray's Trs. v. Murray*, 1872, 10 M. 778.

⁴ In *Macfarlane's Trs. v. Macfarlane*, 1903, 6 F. 201, Lord Kyllachy seems to have treated delivery or intimation of the Minute of the Trustees as rendering their appointment irrevocable (p. 205). In *Sivwright v. Dallas*, 27th January 1824, F.C.; 2 S. 643; the deed of apportionment was kept in the custody of the father's law agent, but intimated to the daughter. Nevertheless it was held revocable.

⁵ See DELIVERY OF DEEDS, Vol. V. p. 533, *ante*.

⁶ *Waddel v. Waddel*, 1842, 5 D. 309.

⁷ Farwell on Powers, 3rd ed., chap. viii.

It was in such cases that appointments were frequently challenged in the Scots Courts on the ground of the illusory character of one or more of the shares.¹ What constituted an illusory share was not very clearly determined. "It consists," said Lord Benholme,² "in a fraud against the trust, making an apportionment which is altogether a mockery."

204. The troubles which this doctrine of the law produced led to the enactment of the Illusory Appointments Act, 1830,³ which provided that no appointment should be invalid "on the ground that an unsubstantial, illusory, or nominal share only" was "appointed to or left unappointed to devolve upon" any of the objects of the power.⁴ Owing to the usual failure to specify the scope of the Act and to the terminology employed, it was doubted whether this statute applied to Scotland;⁵ but the matter ceased to be of practical importance upon the passing in 1874 of the Powers of Appointment Act.⁶ The effect of that Act was to validate the exercise of a power notwithstanding "that any object of such power has been altogether excluded,"⁷ provided that the statutory enactment should not apply to the exercise of a power declared by the constituting deed to be non-exclusive.⁸ This statute was held to apply to Scotland.⁹

SECTION 9.—VALIDITY OF APPOINTMENT.

SUBSECTION 1.—*Restriction to Liferent.*

205. The final and conclusive test of the validity of any exercise of a power is its correspondence with the terms in which the power is constituted. Such questions, therefore, as frequently engage the attention of the Courts as to whether the donee of a power is entitled to restrict one of the objects to a liferent, and the like, are not questions of law but of construction; and such utility as there is in previous decisions arises from the facts that conveyancers use a stereotyped phraseology, and that a term of art which has once received judicial construction in one deed will bear the same meaning in another deed in the absence of evidence that it has been used in a different sense. The simplest form in which a power can be expressed is probably the direction that a fund is to be paid over "in such shares," or "in such proportions," as the donee of the power shall appoint. This, in its literal construction, seems to leave little room for doubt. The function of the donee is that of dividing; the power is one of division or apportionment. But difficulties of construction emerge as soon as the power is extended to include the attaching of conditions or limitations, or both, to the bare function of division.

206. In *Lennox's Trs. v. Lennox*¹⁰ it was held that if the power include the determination not only of the "proportions" in which, but

¹ For the cases, now rendered obsolete, see M'Laren on Wills, 3rd ed., s. 2039 n.

² In *Smith's Trs. v. Graham*, 1873, 11 M. 630, at p. 636.

³ 11 Geo. IV. & 1 Will. IV. c. 46.

⁴ Sec. 1.

⁵ See *Smith's Trs. v. Graham*, *supra*.

⁶ 37 & 38 Vict. c. 37.

⁷ Sec. 1.

⁸ Sec. 2.

⁹ *Mackie v. Mackie's Trs.*, 1885, 12 R. 1230.

¹⁰ 1880, 8 R. 14.

also of the "limitations, conditions, and restrictions" under which, the fund is to be paid, the appointees may be limited to a life interest and a power of testamentary disposal among children, and, failing children, to any other person. The power to attach "conditions" to an appointment seems in *Wright's Trs. v. Wright*¹ to have sufficed to warrant the restriction of an appointee to a life interest *plus* a power of testamentary disposal. There soon came a reaction in the judicial attitude, which first appears in the case of *Warrand's Trs. v. Warrand*.² Although power was there given to appoint "on such conditions and under such restrictions" as the donee might choose, yet his attempt to restrict the appointee to a life interest with a fee to his issue was held to be invalid, and the appointee took the fee of the share to which he was appointed only in life interest. The judicial attitude to the earlier cases of *Lennox's Trs.* and *Wright's Trs.*³ was not one of entire approval; and from the date of *Warrand's* case there are traceable two tendencies of decision which differ in the wider or narrower effect which they give to the "conditions" or "limitations" which the donee of a power is authorised by the use of those terms to impose upon the appointees.

207. The rule that such restrictions or conditions include the power in the donee to limit the appointee to a life interest seems to have originated in the English case of *Carver v. Bowles*.⁴ There the power had been conferred on a testator by his marriage contract to appoint a fund among his children; but it is important to observe that the fund was to be held "upon trust to transfer [it] unto, between, and amongst all and every child and children . . . at such time or times, in such shares, proportions, manner and form, and with, under, and subject to such powers, provisions, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their, issue)" as the spouses, or the survivor of them, should appoint. In exercise of the power so expressed, the donee appointed an equal division among his children subject to the restriction that his daughters' shares were to be "held and applied" by the trustees for the benefit of the daughters respectively "without power of anticipation or alienation," and to their children upon their respective deaths. It was recognised that the provision in favour of the grandchildren was invalid, since it introduced persons who were not objects of the power; but the restriction upon the daughters' right of anticipation or alienation was held to be valid. Accepting this decision as sound, the Scots Courts have applied it to the construction of deeds which in some instances seem to differ materially from that which was there under construction. It should be remembered, however, that the determination of the question whether the donee has a mere power of apportionment or division of the capital, or has also a power to split up and apportion rights of life interest and fee, must be determined by ascertaining the intention of the granter of the power as expressed in the con-

¹ 1894, 21 R. 568.

³ Also to *Wallace's Trs. v. Wallace*, 1891, 18 R. 921.

² 1901, 3 F. 369.

⁴ 1831, 2 Russ. & M. 301.

stituting deed. Now, if the holders of the fund are directed to "hold for behoof of" the objects of the power as the donee may direct, such a direction will readily be construed to cover the conferring of a mere liferent on one or more of the objects.¹ And, accordingly, where trustees under a marriage contract were directed to "hold the capital . . . as a provision for behoof of" the anticipated child or children of the marriage "divisible . . . as" the parents should appoint, it was held to be a valid exercise to confer a mere liferent on one child who was insane, and the fee of the whole on the other child.²

208. On the other hand, there are powers expressed in such terms as to exclude the wider construction adopted in the cases already quoted. It may be matter of clear statement or of legitimate inference that the donor of the power definitely destined the capital of the fund to the objects as a class, and intended the donee to have merely a power of division of the capital. This result may be deduced from an initial gift to the objects as a class. An illustration is found in *MacEwan's Trs. v. MacEwan*,³ where in an antenuptial contract the prospective husband disposed "to and in favour of the child or children of the said intended marriage in fee" his whole estate "under such burdens and conditions and payable at such periods and in such shares or proportions" as he might appoint. It was held that an appointment which purported to restrict a daughter to an alimentary liferent with a fee to her issue was invalid. The leading clause was a distinct gift of the fee; and the reservation was merely of a "power to impose conditions on the gift of fee and to direct the periods at which it should be payable and the shares into which it should be divided."⁴

209. Sometimes a similar construction may be indicated by expressions in the constituting deed which exclude the idea that when the fund is ready for division it is still to be "held" by the trustees for the purpose of securing a liferent interest for some object of the power. The word "pay" may be important in this connection; and when it is associated with a direct class gift to the objects, it may be conclusive to exclude the power of conferring a mere liferent. In *Mackenzie's Trs. v. Mackenzie*,⁵ a marriage contract directed that on the death of the survivor of the spouses the trustees should "hold, pay over, or assign" the fund "to or for behoof of the child or children of the marriage, and that in such proportions and subject to such conditions" as the spouses might direct. An exercise of this power in the form of an unequal division, and a direction to restrict some of the objects to a liferent of a part of their shares, was held invalid. The power was construed as "a power of apportionment merely"; the dominant word in the clause was held to be "proportions," which connoted mere division; but the principal ground for the judgment was that "there is an initial gift of

¹ A good illustration is *Ewing's Trs. v. Ewing*, 1909 S.C. 409.

² *Pringle's Trs. v. Basta*, 1913 S.C. 172.

³ 1917 S.C. 50.

⁴ Per Lord Pres. Strathclyde at p. 53. Cf. Lord Adam in *Neill's Trs. v. Neill*, 1902, 4 F. 636, at p. 639.

⁵ 1927 S.C. 424.

the fee of the estate to the children of the marriage by the opening clause of the purpose.”¹ Certain provisions in the marriage contract giving directions as to “payment” and “vesting” of the shares of the children were held to be appropriate only to a share of capital.

SUBSECTION 2.—*Appointment to Parties not Objects of Power.*

210. The most fundamental flaw that can vitiate the exercise of a restricted power is the inclusion among the appointees of persons not objects of the power, that is, who are not within the restricted class among whom alone the appointment may be made. If the class is defined as “children,” an exercise in favour of grandchildren will be invalid.² If the class be “descendants,” it will not be a valid exercise to destine to “heirs *in mobilibus*,” since these may not prove to be all descendants.³ If the class comes to consist of one member only, the power is evacuated, and the whole provision goes to that member, since the power does not extend to limiting the rights of such sole member of the class.⁴ It must be remembered, however, that in the case of family provisions in a will or marriage contract, a difficult question arises whether the class of “children” may be extended by the operation of the *conditio si institutus sine liberis decesserit*, to the effect of introducing into the class of beneficiaries the issue of a predeceasing member of the class.⁵ If the class of beneficiaries who would take in the absence of appointment is thus enlarged, it seems likely that the class of “objects” of a power would be correspondingly extended⁶ by the application of the *conditio*. It would result from this that, where a provision is made in a deed (such as a will or a marriage contract) into which the *conditio* falls to be read, the delimitation of the class of objects of a power by the word “children” would be extended by operation of law⁷ to be read as “children and the issue of predeceasing children.”⁸ There is some authority for the doctrine that the exercise of a power in favour of persons who are not objects will not necessarily be totally invalid if in the actual event no such person can take benefit.⁹

SECTION 10.—FAILURE TO EXERCISE, OR PARTIAL EXERCISE.

211. Where a power of appointment or apportionment is not exercised, the fund is divided equally among its objects who are alive at the

¹ Per Lord Ormisdale at p. 429.

² *Inverclyde's Trs. v. Lord Inverclyde*, 1910 S.C. 420; *Wright's Trs. v. Wright*, 1894, 21 R. 568.

³ *Darling's Trs. v. Darling's Trs.*, 1909 S.C. 445.

⁴ *Brodie's Trs. v. Mowbray's Trs.*, 1840, 3 D. 31.

⁵ *Hughes v. Edwardes*, 1892, 19 R. (H.L.) 33, per Lord Watson at p. 36.

⁶ See this view in Menzies' *Lectures on Conveyancing*, 1900 ed., p. 382.

⁷ Based, no doubt, on “presumed intention.”

⁸ The question was argued but not decided in *Matthews Duncan's Trs. v. Matthews Duncan*, 1901, 3 F. 533; in *Gillon's Trs. v. Gillon*, 1890, 17 R. 435, Lord Rutherford Clark seems in one sentence (p. 441 ft.) to assume the doctrine stated above. In *Cattanach's Trs. v. Cattanach*, 1901, 4 F. 205, such an argument was ignored in the opinions of the judges, but the decision seems to involve its rejection.

⁹ *Matthews Duncan's Trs.*, *supra*; cf. *Dalziel v. Dalziel's Trs.*, 1905, 7 F. 545.

date of vesting. In some cases an invalid attempt to exercise the power may be equivalent to a total failure;¹ in such a case the division will be equal.² Moreover, in the event of a partial exercise, the part of the fund which is not appointed, or not validly appointed, must be divided equally among all the objects; not in proportion to the shares which may have been validly appointed;³ and not excluding those who may take benefit from a partial appointment.⁴

SECTION 11.—INVALIDITY, WHETHER TOTAL OR PARTIAL.

212. It has long been settled that an invalid condition attached to an appointment may either fall to be treated *pro non scripto* or may invalidate the whole appointment according as it is separable from the valid appointment or not. "The plain rule," according to Lord Chancellor Cairns,⁵ is "that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions." The practical difficulty in the application of this authoritative "plain rule" arises from the fact that in almost every case the excision of the condition affects the value of the benefit taken by the appointee to an extent which leaves one in great doubt whether the donee would have made such an appointment if he had known that the condition or mode of enjoyment which he prescribed would be ignored. It is fairly obvious that a parent who has appointed a son or daughter to a liferent of a certain share would not necessarily have fixed the same share if he had known that the beneficiary would take the capital. Yet the rule quoted above has sometimes been applied to cases in which the division of a fund has been associated with an invalid restriction of the appointees to a liferent; the division has been allowed to stand although freed from the invalid restriction.⁶

213. But there is a contrary tendency of opinion which is based on the reasoning already suggested. In *Baikie's Trs. v. Oxley*,⁷ Lord Curriehill justified the decision of the Court that certain restrictions not authorised by the power constituted a total vitiation of the appointment on the ground that "you cannot tell what appointment the party entrusted with the power would have made had he known that what he

¹ See next section.

² *Baikie's Trs. v. Oxley and Cowan*, 1862, 24 D. 589.

³ *Stirling's Trs. v. Stirling*, 1898, 1 F. 215.

⁴ *Mackenzie's Trs. v. Kilmarnock's Trs.*, 1909 S.C. 472; but see also *Bowie's Trs. v. Paterson*, 1889, 16 R. 983.

⁵ In *M'Donald v. M'Donald's Trs.*, 1875, 2 R. (H.L.) 125, at p. 132.

⁶ *Matthews Duncan's Trs. v. Matthews Duncan*, 1901, 3 F. 533; *Middleton's Trs. v. Middleton*, 1906, 8 F. 1037.

⁷ 1862, 24 D. 589, at p. 596.

attempted to do was, to some extent at least, inept.”¹ And these words were quoted with approval by Lord Rutherford Clark in *Gillon's Trs.*² For similar reasons the Court in a more recent case³ refused to treat invalid conditions as separable and to save the division of the fund by treating the conditions as if they could be ignored. The criterion was also put in a somewhat different form, thus: “The liferent in the case of no child is imposed as a condition on something already given, but is itself the gift; and there appears to me to be no room, therefore, for the severance of the valid from the invalid.”⁴

214. If, however, the invalidity consists, not in attaching invalid conditions of tenure, but in appointing a certain share of the fund to a person who is not an object of the power, then the invalid part of the appointment may be disregarded, and is not held to taint the exercise as it affects the other parts of the fund.⁵ In *Middleton's Trs. v. Middleton*⁶ both elements of invalidity were present. The appointee was restricted to a liferent (which was held to be *ultra vires*) and the fee was given to strangers; yet the decision was that he took the fee of the share to which he was appointed only in liferent. But in the not dissimilar case of *Dick's Trs. v. Cameron*,⁷ the appointment to a daughter in liferent and to her children—“strangers”—in fee was held to be totally invalid for want of an “initial gift” which could be separated from the incompetent limitations.

SECTION 12.—VALIDATION BY CONSENT OF BENEFICIARIES.

215. If an invalid appointment, such as one which brings in strangers to the power, is made with the consent of the objects of the power, is the appointment valid? This question has given rise to a difference of judicial opinion, which leaves the law in some doubt. In *Mackie v. Mackie's Trs.*⁸ a lady, in exercise of a power reserved by her in her marriage contract, appointed a share of the funds to a daughter in liferent and to her children in fee; as the grandchildren were strangers to the power the appointment was clearly invalid, and the question was sharply raised whether the daughter's consent—not in writing—sufficed to validate this *ultra vires* appointment. Proceeding largely upon English authorities,⁹ the Second Division held that it did. This decision, however, was made the subject of criticism in the case of *Macgillivray's Trs. v. Watson's Trs.*¹⁰ Again, a lady having a power to appoint among her children, appointed a share to a son in liferent and to his issue in fee. The same invalidity based on the inclusion of strangers was urged, and

¹ Cf. Lord Mackenzie in *Watson v. Marjoribanks*, 1837, 15 S. 586, at p. 591.

² 1890, 17 R. at p. 442.

³ *Mackenzie's Trs. v. Mackenzie*, 1927 S.C. 424.

⁴ Lord Ormisdale in *Mackenzie's Trs.*, *supra*.

⁵ *Cattanach's Trs. v. Cattanach*, 1901, 4 F. 205. Cf. *Smith Cuninghame v. Anstruther's Trs.*, 1872, 10 M. (H.L.) 39.

⁶ 1906, 8 F. 1037.

⁷ 1907 S.C. 1018.

⁸ 1885, 12 R. 1230.

⁹ *White v. St Barbe*, 1813, 1 Ves. & B. 399, and Sugden on Powers, 8th ed., p. 670.

¹⁰ 1911 S.C. 1103.

the same plea of validation by consent was used in reply. But the consent relied on was that of the *curator bonis* of the liferenting son who was *incapax*. He had no issue. The consent founded on was given in the Special Case—by amendment at the Bar—and this was held not to validate the appointment. Although the cases were perhaps distinguishable, this decision, and particularly the criticisms of Lord Dundas, threw considerable doubt on the soundness of that in *Mackie's* case. And this fact was recognised in the next case. *Macleod's Trs.* v. *Macleod's Trs.*¹ was indistinguishable in its facts from *Mackie*, and that case was accepted as authoritative, and followed; but, while Lord Kinnear seems to have been satisfied with its soundness, Lord Johnston associated himself with the criticisms made upon it by Lord Dundas.

216. It should be observed that Lord Dundas (in *MacGillivray's Trs.*) did not challenge the authority of the English decisions which had been founded on in *Mackie's* case; but he gave to them a more restricted significance. He limited the effect of the liferenter's consent to the cases where "issue (strangers to the power) may be validly brought within the scope of an appointment by an instrument or instruments when (as Lord St Leonards puts it) 'the act operates first as an appointment, and secondly as a settlement by the appointee.'" In another passage² he recognises that "it may well be that where, as here, a mother is given power to appoint a fund among her children, she might, with the express concurrence of one of them . . . so arrange as validly to appoint the share of the fund which she intended for that child to its issue, the transaction being truly of a double character, though contained (it may be) in one deed, viz., an appointment by the mother to her child, and an assignation by the appointee to his or her own children." Only within such narrow limits as Lord Dundas here describes, can it be said with any confidence that "consent" of a person restricted to a liferent will sanction the gift of a fee to his children, being strangers to the power.

SECTION 13.—"FRAUDULENT" APPOINTMENTS.

217. A limited power of appointment, not being a proprietary right, but partaking rather of a fiduciary character, must be exercised for the purpose for which it has been created, and not to serve some private object of the donee.³ An exercise of the power in violation of this rule is sometimes described as a "fraud" upon the power; but the use of such a term should not suggest anything dishonest or immoral. "It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power."⁴ A typical, or perhaps an extreme, case of "fraudulent" exercise of a power is that of a donee who appoints in favour of one of the objects under a secret arrangement with the

¹ 1914 S.C. 10.

² 1911 S.C. at p. 1109.

³ Farwell on Powers, chap. x.

⁴ Lord Parker in *Vatcher v. Paull*, [1915] A.C. at p. 378.

latter that the donee is to obtain a financial benefit out of the fund appointed.¹

218. In dealing with a parent's power of appointing a fund among his children, the Court is suspicious of anything in the nature of a transaction between the parent and a child, in which the interests of the parent may seem to be more considered than those of the child. "The very notion of a parent bargaining with a child, . . . entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy, would be a notion inconsistent with the law . . . as to the protection of a child's interest that is to be expected on the part of a parent. . . ." ² On this principle it was held ³ that, where a mother having a power to appoint a fund among her children had bought the interest of a son in the fund, the transaction could not stand, even although the purpose of the mother was to provide her son with the money required to obtain his discharge in bankruptcy. "She stood in such a relation to [her son] as to make it impossible for her to acquire, at an under value, his reversionary share of a fund which she had the power of increasing or diminishing at pleasure. Without saying that there was anything wrong in her so acquiring this interest, she must be held to have acquired it as trustee for her son." ⁴

219. It is not necessary, however, to a "fraud" on the power in this sense either that the donee is seeking personal advantage from its exercise or that there is any element of transaction or bargain between him and an object of the power. It is sufficient that the pretended appointment is not a *bona fide* exercise of the power for the purpose for which it was conferred. Thus, in *Dick's Trs. v. Cameron*,⁵ a father, the donee of a power of appointing among his children, gave to his daughters a very small share of a large fund, with the alternative that they might accept the liferent of large sums which had been given them in an invalid deed of appointment by their mother. The father's appointment was described by the Court as "merely a threat, a weapon which he used for the purpose of concussing the daughters to agree to a disposition of the marriage-contract funds, which was contrary to the provisions of the contract and which he had no power to make. I think that that was an illegitimate use—indeed, an abuse—of the power, which the Court cannot sanction." ⁶

¹ See, e.g., *Cloutte v. Storey*, [1911] 1 Ch. 18.

² *Smith Cuninghame v. Anstruther's Trs.*, 1872, 10 M. (H.L.) 39, per Hatherley L.C. at p. 49.

³ *M'Donald v. M'Grigor*, 1874, 1 R. 817.

⁴ *Ibid.*, per Lord Justice-Clerk Moncreiff at p. 822.

⁵ 1907 S.C. 1018.

⁶ Per Lord Low at p. 1026.

FAIRS AND MARKETS.

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SECTION 1.—HISTORICAL.

220. The right of holding fairs was in ancient times granted by the Sovereign, and there are many instances in which such rights have been granted to burghs and private persons. The privilege of fairs was that no goods brought to them could be attached or person arrested on them for anterior debts, but only for crimes committed or debts contracted during the fair.¹ By a series of old Scots Acts,² forestalling (*i.e.* buying merchandise coming to the market before it is presented there) or engrossing or regrating (*i.e.* buying goods in the market and reselling the same within four miles thereof) were prohibited and made severely punishable. These Acts have long been in desuetude. The person to whom a right of fair had been granted was allowed to levy tolls or customs, but only to the extent authorised by his grant or by immemorial custom.

221. In addition to grants by the Sovereign, many Acts of Parliament were passed during the sixteenth century, conferring the right of holding markets and granting power to collect tolls and customs. Any right of fair granted was subject to other rights of the same nature which had been previously conferred, and which could not be restricted.³ Where a grant was given by the Crown to a burgh of the sole right of holding fairs within a radius of two miles of the town it was held that the right so given had denuded the Sovereign of all power to authorise other markets within the boundary.⁴ There are numerous Acts of the Scots Parliaments dealing with fairs.⁵ These Acts prohibited fairs being held on Sundays or in kirks, and appointed censors to imprison profane swearers at fairs. By the law of Scotland—differing from the English law—stolen property sold at a fair might be recovered by the true owner.⁶

GENERAL AUTHORITIES.—Ersk. i. 4, 29; Bankt. i. 19; 12-15 Kames, Statute Law, voce "Fairs."

¹ *Gibson v. Ker*, 1552, Mor. 4145.

² 1535, c. 26; 1540, c. 98; 1579, c. 26.

³ *Falconer v. Lord Glenbervie*, 1642, Mor. 4146.

⁴ *Mags. of Stirling v. Murray*, 1706, Mor. 4148.

⁵ 1456, c. 9; 1503, c. 36; 1581, c. 5.

⁶ *Bishop of Caithness v. Fleshers in Edinburgh*, 1629, Mor. 4145.

SECTION 2.—MODERN REGULATIONS.

222. Fairs and markets are now regulated by the Markets and Fairs Clauses Act, 1847.¹ The provisions of the Act are very numerous, and deal with the construction of markets, erection of slaughter-houses, weighing of goods and carts, tolls, and by-laws. By the Markets and Fairs (Weighing of Cattle) Act, 1887,² it was enacted that, at or near all fairs or markets, accommodation should be provided for weighing cattle, and that either a buyer or a seller should have the right to have cattle weighed. The Secretary for Scotland had power to exempt any market in Scotland from the provisions of the Act. By an amending statute,³ the powers vested in him have now been transferred to the Board of Agriculture. The last-mentioned Act provided for a return by the market authorities of certain markets to the Board of Agriculture, of the number of cattle entering the market, the weight of the cattle weighed, and the prices obtained for cattle sold. A schedule to the Act gives five markets in Scotland, the authorities of which are called on to make a return, namely, Aberdeen, Dundee, Edinburgh, Glasgow, and Perth; but the Act gives power to the Board of Agriculture to increase the number. Auctioneers are required to provide at their marts facilities for weighing cattle.

223. Under s. 277 of the Burgh Police (Scotland) Act, 1892,⁴ wide powers are granted to the Commissioners as to markets and the provision and improvement of market-places. They may establish new markets, provided they do not interfere with the existing rights and privileges of any person. The power to levy tolls cannot be exercised till the tolls proposed have been approved by the Sheriff. This section applies the provisions for regulating markets contained in the Markets and Fairs Clauses Act, 1847,¹ to all markets already established, whether they were established before or after 1847.⁵ Under the Diseases of Animals Act, 1894,⁶ a local authority may provide wharves and stations for the landing, reception, keeping, sale, slaughter, and disposal of foreign and other animals, carcasses, fodder, litter, dung, and other things. A wharf or other place so provided is a market within the Act of 1847, and the local authority may make by-laws to regulate its use. Such by-laws are to be approved by the Board of Agriculture, and not by the Sheriff,⁷ and before approving them the Board need not hear objectors.⁸ By-laws made under the statute may prohibit the use of the sale rings for private sales, or for sales in which any class of the public are excluded from buying.⁹

224. The rights of the public in markets and market-places were considered in two comparatively recent cases. The magistrates of

¹ 10 & 11 Vict. c. 14.

³ 54 & 55 Vict. c. 70.

⁵ *M'Call v. Mitchell*, 1911 S.C. (J.) 1; 6 Adam 303.

⁷ *Ibid.*, s. 37.

⁹ *Scott, supra*, and in 1 F. (H.L.) 55.

² 50 & 51 Vict. c. 27.

⁴ 55 & 56 Vict. c. 55.

⁶ 57 & 58 Vict. c. 57, s. 32.

⁸ *Scott v. Glasgow Corporation*, 1829, 1 F. 665.

Edinburgh were held not entitled to exclude the public from a market-place for three weeks, and assign part of a public street for the purposes of the market.¹ Lord Watson expressed the opinion also that the magistrates had no power to exclude the public from the market-place during market hours.²

¹ *Mags. of Edinburgh v. Blackie*, 1884, 11 R. 783; 1886, 13 R. (H.L.) 78; cf. *Murray v. Mags. of Forfar*, 1893, 20 R. 908.

² 13 R. (H.L.) at p. 87.

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SECTION 1.—INTRODUCTORY.

225. After the introduction of feus, the right of ferry, which was by the Roman law accounted *res publica*, became *inter regalia*, or *in patrimonio principis*.¹ But the right, although *inter regalia*, is not vested in all the public, any more than the public are entitled to fish for salmon because salmon-fishings are *inter regalia*.² Originally, the right of ferry was granted to individuals and burghs for the public convenience and for the profit of the donee. After a time ferries became part of roads and fell under the road authorities, and a distinction then arose between public and private ferries. This distinction is rather one of practical convenience than of legal effect, for all ferries which connect public roads are open to the public.³ Ferries created and regulated by special Acts of Parliament, or under the management of the road authorities of the roads which they connect, are called public.⁴ Ferries created by a grant from the Sovereign to a particular person are styled private.⁵ Many ferries “grow up by use, without any distinct original erection”;⁶ *e.g.* it sometimes happens that a ferry belongs to the trustees of the road which has been made down to the banks or shores of a river or arm of the sea, or to the proprietor of the banks on which the road has been made.

SECTION 2.—TITLE.

226. The title to a public ferry, from its nature, is not open to question. The title to a private ferry may be a charter from the Crown

GENERAL AUTHORITIES.—Rankine on Land-Ownership, 4th ed.; Ferguson on Law of Roads, Streets, etc., 1904; Coulson and Forbes on Law of Waters, 1924, 4th ed.; Armour on Valuation for Rating, 2nd ed.

¹ Ersk. ii. 6, 17.

² *Duke of Montrose v. Macintyre*, 1848, 10 D. 896, per Lord Justice-Clerk Hope at p. 900.

³ Ferguson on Roads, p. 347.

⁴ Bell's Prin., s. 652.

⁵ *Ibid.*, s. 653.

⁶ *Duke of Montrose v. Macintyre*, *supra*.

or from a private individual followed by prescription.¹ A title to a ferry may also arise from a charter of Barony² or from a charter of royal burgh, followed by prescription.³ In the case of the *Duke of Montrose* opinions were expressed that a Barony title was sufficient without prescription,⁴ and even that an ordinary charter, followed by prescription, gave a title.⁵ A *prima facie* title to sue in an action of interdict is given, where no rival titles are produced, by conveyances by the owners of the lands on either side of a ferry of their whole rights of ferry, without the pursuers having to aver that their authors' titles are founded either upon Crown grants or upon Barony titles followed by prescription, or that possession of the ferry has followed on these titles.⁶

SECTION 3.—EXTENT OF THE RIGHT.

227. A grant of right of ferry implies the exclusive right of conveying passengers and their baggage between fixed points on the two sides of a narrow sea, or of a river or loch.⁷ A grant of ferry does not extend to the privilege of carrying goods.⁸ In exercising a right of ferry there must be no interference with ordinary navigation.⁹

228. A ferry is "part of the highroad of the country," which is not to be encroached upon,¹⁰ and the grantee of the right may interfere to prevent any evasion of the right. It is not evasion for the owners of a steamboat to convey passengers on board to and from the shore in a private boat, although a right of ferry exists at the place where this is done.¹¹ A person resident within the bounds of a ferry may convey himself, his family, servants, and visitors; but it is illegal for him to convey even gratuitously any other.¹² The right of ferry is properly an exclusive right to convey passengers by boat only, and it has been held that an action for disturbance or infringement does not lie against one who interferes otherwise than by means of boats, *e.g.* by building a bridge.¹³ In neither of the cases cited, however, was the bridge built on the site

¹ *Dundee Harbour Trs. v. Dougall*, 1848, 11 D. 6; *Tarbat v. Bogle*, 1731, Mor. 4167, quoted in 10 D. 896, at p. 903.

² *Duke of Montrose v. Macintyre*, 1848, 10 D. 896.

³ *Greig v. Mags. of Kirkcaldy*, 1851, 13 D. 975.

⁴ Per Lord Justice-Clerk Hope and Lord Wood, *contra* per Lord Ivory.

⁵ Per Lord Justice-Clerk Hope and Lord Cunningham.

⁶ *London, Midland and Scottish Rly. Co. v. M'Donald*, 1924, S.C. 835.

⁷ *Moir v. Hunter*, 1832, 11 S. 32; *Baillie v. Hay*, 1866, 4 M. 625; *Pim v. Curell*, 1840, 6 M. & W. 234; *London, Midland and Scottish Rly. Co. v. M'Donald*, *supra*, per Lord Pres. Clyde at p. 840.

⁸ *Fergusson v. Dowall*, 18th January 1815, F.C., per Lord Glenlee; *Walker v. Jackson*, 1842, 10 M. & W. 161.

⁹ *Ferguson on Roads*, p. 354.

¹⁰ *Campbell v. Campbell*, 18th January 1815, F.C.; *affd.* 6 Pat. 417.

¹¹ *Hunter v. Napier*, 1830, 9 S. 86; *Moir v. Hunter*, *supra*.

¹² *Tarbat v. Bogle*, 1731, Mor. 4176; *Martin v. Thomson*, 16th June 1818, F.C.; *Weir v. Aiton*, 1858, 20 D. 968; *Mearns v. Myers*, 1872, 2 Coup. 296.

¹³ Bankt. ii. 7, 23; *Bell's Prin.*, s. 653; *Hopkins v. Great Northern Rly. Co.*, 1877, 2 Q.B.D. 224; *Dibdin v. Skirrow*, [1908] 1 Ch. 41.

of the ferry, but at some distance from it, and the operation of the ferry was not interfered with. In the event of the site of a ferry being wholly or partly used for the erection of a bridge and the working of the ferry being interfered with, it is possible that, since a right of ferry is a heritage, if land had to be taken from the owner of this heritage, it would become a heritage injuriously affected by the existence of the bridge, and in such circumstances a claim for compensation might arise even when the damage might be caused by user and not by the construction of the bridge.¹

229. The Crown cannot grant, and no one may set up, another right of ferry within the space covered by an existing ferry.² A grantee of a ferry is not prevented from interdicting a person who encroaches upon the ferry because an evasive landing-place is used.³ It does not, however, necessarily follow that the establishment of another boat plying between points in the vicinity of those served by the ferry constitutes an infringement, if it has been set up *bona fide* for the accommodation of new and different traffic.⁴ In this connection, it must be noted that in *Hammerton* Lord Sumner expressed doubt on the soundness of the judgment in *Cowes* in so far as it rested on "a considerable change of circumstances and a new condition created by the growing development of excursion traffic."⁵ An application for interdict by parties possessing a right of ferry, who had allowed another party to establish ferry-boats and ply without challenge for several months, was refused pending a discussion on the question of right.⁶ But where a company, working a ferry, founded on conveyances of the right of ferry as their title, a defence that the company's right was not exclusive, in respect that the defender had plied for hire on the ferry for five years, without title, was held irrelevant.⁷

230. A right of ferry, or part of the right, may be lost by disuse, or rather by contrary usage.⁸ It is not incompatible with the establishment of a right of ferry, however, that it is not always in operation, owing to the fact that at low tide it is possible for the public to cross the ferry on foot.⁹ A right of ferry gives no ownership of the bank, even when permission has been given to erect a landing-place.¹⁰ Where the grantee of a right of ferry can lawfully land passengers on the bank,

¹ Cripps on Compensation, 6th ed., p. 161.

² *Campbell v. Campbell*, 18th January 1815, F.C.; affd. 6 Pat. 416; *Fergusson v. Dowall*, 18th January 1815, F.C.; *Kinghorn Ferry Trs. v. Crichton*, 1821, 1 S. 220; *Mags. of Kirkcaldy v. Greig*, 1846, 8 D. 1247; *Tripp v. Frank*, 1792, 4 T.R. 666; *Huzzey v. Field*, 1835, 2 C.M. & R. 432; *Newton v. Cubitt*, 1859, 5 C.B. (N.S.) 627; 12 C.B. (N.S.) 32; 13 C.B. (N.S.) 864; *Hammerton v. Earl of Dysart*, [1916] 1 A.C. 57.

³ *Mags. of Kirkcaldy v. Greig*, *supra*.

⁴ *Newton v. Cubitt*, *supra*; *Cowes Urban Council v. Southampton, etc. Royal Mail Steam Packet Co.*, [1905] 2 K.B. 287; *Hammerton v. Earl of Dysart*, *supra*.

⁵ *Hammerton v. Earl of Dysart*, [1916] 1 A.C. 57, per Lord Sumner at p. 108.

⁶ *Fife Ferry Trs. v. Mags. of Dysart*, 1827, 6 S. 265.

⁷ *London, Midland and Scottish Rly. Co. v. M'Donald*, 1924 S.C. 835.

⁸ Rankine on Land-Ownership, p. 302.

⁹ *Layzell v. Thompson*, 1927, 96 L.J. (Ch.) 332.

¹⁰ *Baillie v. Hay*, 1866, 4 M. 625.

he is not responsible if the passengers have afterwards to cross the land of another in order to reach a public place.¹

SECTION 4.—THE SUPERVISION OF FERRIES.

SUBSECTION (1).—*General Regulation.*

231. The Justices of the Peace and the Commissioners of Supply were at one time charged with the supervision and regulation of ferries and they had also the statutory right to regulate the fares at ferries.² The County Councils now take the place of the Commissioners of Supply and Road Trustees,³ and all administrative powers and duties of the Justices in respect of ferries have been transferred to County Councils by the Local Government (Scotland) Act, 1908.⁴ The County Council is thus now charged with the duty which formerly lay upon the Commissioners of Supply and Justices of the Peace⁵ of enforcing the obligations of the grantee of a ferry. The obligations on the grantee are to provide safe and convenient boats and boatmen for the passage, to transfer passengers and luggage, and, if such has been the custom, carriages also.⁶

SUBSECTION (2).—*Upkeep.*

232. As regards the upkeep of ferries, the Minister of Transport has authority to make, with the Treasury's approval, advances by way of grant or loan to the County Council or other authority for the construction, improvement, or maintenance of ferries.⁷ No funds, however, have so far been voted by Parliament for this purpose, and the only fund available for such grants is the Road Fund, which was established by the Roads Act, 1920.⁸ By Schedule 1 of this Act, amending the Development and Road Improvement Funds Act, 1909, the Minister has power, with the Treasury's approval, to make to any highway authority advances in respect of the construction or maintenance or improvement of road-ferries, or to make such advances in conjunction with a highway authority to any company or person.⁹ Hitherto, there has only been one instance of the exercise of this power, a grant being made for the maintenance of Woolwich Free Ferry, which is controlled by the London County Council, in respect that, being a free ferry, there

¹ *Stirling Crawford v. Clyde Navigation Trs.*, 1881, 8 R. 826.

² 1669, c. 16; 1686, c. 8; 5 Geo. I. c. 30, s. 5; 8 & 9 Vict. c. 41; *Martin v. Easton*, 1830, 8 S. 952.

³ Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), s. 11, as interpreted by 8 Edw. VII. c. 62, s. 11.

⁴ 8 Edw. VII. c. 62, s. 11 (2).

⁵ Ersk. i. 4, 14; Bankt. ii. 7, 23; Bell's Prin., s. 653; *Martin v. Easton*, *supra*; *Justices of the Peace of Fife v. Mags. of Kinghorn*, 1762, Mor. 1988, 7617; *Justices of the Peace of Midlothian v. Galloway*, 1775, Mor. 7620.

⁶ Rankine on Land-Ownership, p. 303.

⁷ Ministry of Transport Act, 1919 (9 & 10 Geo. V. c. 50), s. 17 (b).

⁸ 10 & 11 Geo. V. c. 72, s. 3.

⁹ 10 & 11 Geo. V. c. 72, Sched. 1, amending 9 Edw. VII. c. 47, s. 8.

were no tolls or charges by which it could be maintained.¹ A County Council has powers to take over a ferry from a proprietor who does not desire to maintain it.²

SUBSECTION (3).—*Tolls and Charges.*

233. The County Council may prepare a schedule of rates, to which, after it has been approved by the Sheriff, the parties owning or working the ferry are obliged to conform.³ The function of the Sheriff is not to hear evidence or to decide whether a proposed alteration of existing fares is justified, these matters being in the province of the regulating authority, but to approve of the fares fixed by the County Council unless their discretion has been exercised on insufficient material, or carried out in an unreasonable or arbitrary manner.⁴ Persons aggrieved by the act of the County Council may appeal from the Sheriff-Substitute to the Sheriff-Principal,⁵ and members of the public appearing as objectors to the proposed schedule are "persons aggrieved."⁶ It has been laid down in previous cases that rates must be fair and reasonable,⁷ and that they may be raised when an extraordinary outlay is required.⁸ The substitution of a bridge for a ferry has also been sanctioned.⁹

SUBSECTION (4).—*Ferries in Burghs and Statutory Undertakings.*

234. The Local Government (Scotland) Act, 1908, naturally exempted from the supervision of County Councils ferries belonging to or under the control of the Magistrates and Council of any Burgh. The Act also had no application to "ferries vested in or belonging to or worked by any railway company or any river or navigation trustees or other authority or person under any Act of Parliament or Provisional Order confirmed by Act of Parliament."¹⁰ These statutory undertakings were regulated by the terms of their Acts, which in some cases gave to the Board of Trade the regulation of fares and charges. In 1919 the Ministry of Transport was created, the Act of Parliament providing, *inter alia*, that all powers and duties formerly exercised by other Government Departments, in relation to ferries, should by Order in Council be transferred to the Ministry of Transport.¹¹ There are, however, no general Acts of Parliament or Board of Trade or Ministry of Transport Orders governing the running of ferries in Scotland, and thus the only

¹ Report on Administration of the Road Fund, 1926-27, p. 20, para. 62.

² 8 Edw. VII. c. 62, s. 11 (4).

³ *Ibid.*, s. 11 (3).

⁴ *Kessock Ferry Joint Committee, Petrs.*, 1917, 33 S.L. Rev. 178.

⁵ 8 Edw. VII. c. 62, s. 11 (6).

⁶ *Kessock Ferry Joint Committee, supra.*

⁷ *Mags. of Montrose v. Scott*, 1755, Mor. 4167; *Cumming v. Smollett*, 1852, 14 D. 885.

⁸ *Mags. of Montrose v. Scott, supra*; *Martin v. Easton*, 1830, 8 S. 952.

⁹ *Cumming v. Smollett, supra.*

¹⁰ 8 Edw. VII. c. 62, s. 11 (5).

¹¹ Ministry of Transport Act, 1919 (9 & 10 Geo V. c. 50), s. 2 (e).

powers and duties exercised by the Minister, apart from that of making advances by grant or loan in the event of moneys being voted for that purpose,¹ as already mentioned, are those detailed in the Acts or Orders by which the ferries are authorised. There is no general control by any Government department as to the rates to be charged,² and the various Acts differ as to the methods of fixing such rates, *e.g.* the fares to be charged at the London and North-Eastern Railway Company's ferries over the Forth are detailed in the schedules appended to the Act;³ the Forth Conservancy Board is authorised to charge "such rates as may from time to time be approved by the Minister of Transport";⁴ while the London, Midland and Scottish Railway Company has power "to take and levy reasonable tolls, rates, duties, and charges" at their ferry from Kyle of Lochalsh to Skye.⁵

SUBSECTION (5).—*Valuation.*

235. For valuation purposes, ferries are included in the expression "lands and heritages" in the Valuation of Lands (Scotland) Act, 1854.⁶

¹ Ministry of Transport Act, 1919 (9 & 10 Geo. V. c. 50), s. 17 (*b*).

² See Supplementary Report of the Rural Transport (Scotland) Committee, 1920, Section II., Ferries, p. 23.

³ London and North-Eastern Railway Order Confirmation Act, 1925 (15 & 16 Geo V. c. 70).

⁴ Forth Conservancy Order Confirmation Act, 1921 (11 & 12 Geo. V. c. 5), s. 45.

⁵ Highland Railway Act, 1893 (56 & 57 Vict. c. 91), s. 16.

⁶ 17 & 18 Vict. c. 91, s. 42. See also Armour on Valuation for Rating, 2nd ed., pp. 79, 337.

FERTILISERS AND FEEDING STUFFS.

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SECTION 1.—INTRODUCTORY.

236. The sale of fertilisers and feeding stuffs has been the subject of statutory regulation since 1893. The Fertilisers and Feeding Stuffs Act of that year ¹ was repealed by a later statute of 1906,² and that in its turn was repealed by an Act of 1926 ³ which now governs the law on this subject.

SECTION 2.—WARRANTIES.

237. Every person who sells for use as a fertiliser of the soil, or as food for cattle or poultry, any article included in the schedules to the Act must give the purchaser on or before delivery, or as soon as reasonably practicable thereafter, a statement in writing (referred to in the Act as a statutory statement) containing the following particulars:—

- (a) The name under which the article is sold.
- (b) Such particulars (if any) of the nature, substance, or quality of the article as are in relation to the article mentioned in the schedule as applicable to it.
- (c) Where the article, if a feeding stuff, contains any ingredient included in the Third Schedule to the Act, the name of such ingredient (s. 1).

The obligation does not apply (i) to sales of two or more articles which are mixed at the request of the purchaser before delivery to him; or (ii) to sales of quantities of fifty-six pounds or less if the article is taken in the presence of the purchaser from a parcel bearing a conspicuous label marked with the particulars required in the statutory statement.

238. The statutory statement shall, notwithstanding any contract or notice to the contrary, have effect as a written warranty by the seller that the particulars contained in it are correct (s. 2 (1)).

239. The First and Second Schedules to the Act contain lists of feeding stuffs with regard to each of which the particulars to be contained

¹ 56 & 57 Vict. c. 56.

² 6 Edw. VII. c. 27.

³ 16 & 17 Geo. V. c. 45.

in the statutory statement are specified, and the Third Schedule contains a list of ingredients in feeding stuffs the presence of which must be declared. On the sale for use as food for cattle or poultry of articles included in these schedules there is implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such, and that it does not, except as otherwise expressly stated in the statutory statement, contain any ingredient included in the Third Schedule (s. 2 (2)).

240. The Fourth Schedule to the Act contains a list of articles sold under certain names and defines the composition of each. Where an article sold for use as a fertiliser of the soil, or as food for cattle or poultry, is described in a statutory statement or other document by a name specified in the schedule, the sale of the article under that name has effect as a written warranty that the article accords with the definition in the schedule (s. 2 (3)).

241. Any statement as to the amount of chemical or other ingredients, or as to the fineness of grinding of an article sold for use as a fertiliser of the soil, or as to the amount of the nutritive or other ingredients of an article sold for use as food for cattle or poultry, which is made after the commencement of the Act in any written document (other than a statutory statement) descriptive of the article has effect as a warranty by the seller that the facts stated are correct (s. 2 (4)).

242. No action on any such warranty as is mentioned in the section shall lie for any misstatement therein as to the particulars of the nature, substance, or quality of the article or as to the amount of any ingredient, where the misstatement does not exceed the limits of variation (if any) prescribed under the Act in relation to such particulars or amounts, but where the misstatement exceeds such limits, the rights of the purchaser under the warranty shall not be affected by such limit (s. 2 (5)).

243. The expression "cattle" is defined as meaning bulls, cows, oxen, heifers, calves, sheep, goats, and swine.

SECTION 3.—SAMPLES AND ANALYSES.

244. The purchaser of any fertiliser or feeding stuff which is either included in the Act or is the subject of a warranty, express or implied, by the seller, is entitled, on payment of such fee (if any) as may be fixed under the Act, to have a sample of the article taken by an official sampler and analysed by the agricultural analyst. The purchaser must, if requested, furnish to the official sampler the statutory statement or warranty relating to the article, or a copy thereof (s. 3 (1)). The sample must be taken in the prescribed manner, and shall not be taken after the expiration of fourteen days from the delivery to the purchaser of the article sampled, or the receipt by the purchaser of the statutory statement or warranty, whichever date may be the later (s. 3 (2)).

245. All samples, whether submitted by a purchaser or taken other-

wise under the Act, must be divided by the official sampler into three parts, marked, and sealed. Two parts must be sent to the agricultural analyst and the third to the owner or to the seller. The analyst analyses one part and keeps the other for a prescribed period. If the owner or seller objects to the analyst's certificate he may have the retained part submitted to and analysed by the Government Chemist. An analyst must send his certificate to the person who submits the sample and, where that person is not the purchaser, also to the purchaser, and in every case to the owner or seller. If he does not know the name and address of the owner or seller he must send the certificate intended for him to the person who submitted the sample, who shall forward it to the owner or seller (s. 13).

SECTION 4.—MARKING AND REGISTERS.

246. Every parcel of an article included in the first column of the First Schedule to the Act, when prepared for sale or consignment for use as a fertiliser of the soil or as food for cattle or poultry, shall, if exposed for sale, or, if not exposed for sale, before being removed from the premises where it is so prepared, be marked in the prescribed manner with a mark or marks stating or indicating the particulars required by the Act to be contained in the statutory statement (s. 4 (1)).

247. Any person dealing in such parcels may keep a register of marks specifying the particulars which the several marks are used as indicating, and the marking of a parcel with any mark entered in the register shall be treated as indicating that the particulars of the article are those entered in the register in relation to the mark. On the sale of any parcel so marked the mark shall be added to the statutory statement (s. 4 (2)). In the case of articles delivered or consigned direct from a ship or a quay to a purchaser, the seller shall enter in a register kept by him (a) the date and place of delivery and the quantity delivered; (b) any shipping or other mark on the article; and (c) the particulars required by the Act to be contained in the statutory statement (s. 5 (2)).

SECTION 5.—DELETERIOUS INGREDIENTS IN FEEDING STUFFS.

248. Any person who sells or offers or exposes for sale for use as food for cattle or poultry any article which contains any ingredient deleterious to cattle or poultry, or has in his possession, packed and prepared, for sale for such use any such article, is guilty of an offence against the Act unless he proves (a) that he did not know and could not with reasonable care have known that the article contained a deleterious ingredient; and (b) where he obtained the article from some other person, that on demand by the prosecutor he gave all information in his power with respect to the person from whom he obtained it, and as to the statutory statement given to him, and as to any mark applied to the article when he obtained it (s. 7). Proceedings are not to be instituted under this section unless

the article has been sampled by an inspector on the premises and the sample analysed. Certain deleterious substances are enumerated in the Fifth Schedule to the Act, and where these are present, or are present in excess of the quantity indicated in the schedule, they shall be deemed to be deleterious unless the contrary is proved (s. 7 (2)).

SECTION 6.—OFFENCES AND PENALTIES.

249. Penalties are prescribed for failure to give a statutory statement in the prescribed form, or to add to the statutory statement any mark required by the Act to be added thereto, and for misstatements in the statutory statement (s. 8); for failure to mark parcels as required by the Act or to mark the required particulars, or for marking particulars which are false, to the prejudice of the purchaser (ss. 4 (3) and 6); for failure in the case of consignments *ex ship* or quay to enter in the register the prescribed marks or particulars, or for entering false particulars (s. 5 (3)). Particulars are not to be deemed to be false to the prejudice of the purchaser if the misstatement as respects any ingredient does not exceed the limits of variation (if any) prescribed under the Act (s. 26 (5)). Penalties are also prescribed for fraudulently tampering with a sample (s. 14) and for wilfully obstructing an inspector in the execution of his duties (s. 15).

250. Where proceedings are taken against a person in respect of causing or permitting any name, mark, or particulars to be false, or for making a false entry in his register, or for failure to state the presence in a feeding stuff of an ingredient included in the Third Schedule to the Act, he shall not be liable to conviction if he proves (a) that having taken all reasonable precautions he had not reason to suspect the correctness of the mark or entry, or the presence of the ingredient; and (b) where he obtained the article from some other person, that he gave the prosecutor all the information in his power with respect to the person from whom he obtained it and as to the statutory statement given to him, and as to any mark applied to the article when he obtained it (s. 20 (2)). Such prosecution shall not be instituted after the expiration of three months from the date on which a sample of the article was taken (s. 20 (3)).

251. Proceedings under the Act may be taken in the place where the person charged resides or carries on business (s. 21 (1)). It is no defence to allege that, a sample having been taken for analysis only, there was no prejudice to the purchaser (s. 21 (2)). The analyst's certificate shall, in either civil or criminal proceedings, be sufficient evidence of the facts therein stated, unless the defendant or person charged requires that the analyst be called as a witness, or that the sample be further analysed by the Government Chemist. The certificate of the Government Chemist shall be sufficient evidence of the facts therein stated, unless either party to the proceedings requires that the person who made the analysis be called as a witness (s. 22).

SECTION 7.—ADMINISTRATION.

252. The Board of Agriculture for Scotland is responsible for the administration of the Act in Scotland (s. 28 (1) (a)). Provision is made for enforcement of the Act by the local authorities under the Diseases of Animals Act, 1894, and the expenses incurred are to be defrayed out of a rate levied in like manner as the local rate under that Act. The local authorities may appoint joint committees for the purposes of the Act (s. 28 (1) (b) (c)). The local authorities may appoint agricultural analysts, inspectors, and official samplers, subject to the approval of the Board (s. 11). Powers are conferred upon inspectors to enter premises and to take samples (s. 12), and provision is made for analysis of samples taken by inspectors and official samplers (s. 13).

253. The Minister of Agriculture and the Board of Agriculture for Scotland may, after consultation with an advisory committee appointed under the Act, jointly make regulations for varying the schedules to the Act and for prescribing the manner of marking and the nature of marks, the limits of variation of ingredients, the manner of taking samples, and the method of making analyses, and also as to the qualifications of agricultural analysts and the form of their certificates of analysis (s. 23 (1)).

FEU.

FEU-CHARTER.

FEUDAL CASUALTIES.

FEUDAL SYSTEM.

See CASUALTIES OF SUPERIORITY; CHARTER (FEUDAL);
SUPERIOR AND VASSAL.

FIAR.

See CONJUNCT RIGHTS; LIFERENT AND FEE;
SUCCESSION.

FIARS PRICES.

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SECTION 1.—DEFINITION AND OBJECTS.

254. Fiars prices is the term used to indicate standard prices of grain annually fixed by the Sheriff, the objects being to settle the rate at which the stipend of the parochial clergy and any other money payments referable to the current value of agricultural produce are to be converted into money. The term “fiar” has no relation with the same word signifying an owner of heritable property, but is identical with the Middle English *feor*, Old French *feur*, a price, being a derivative from Latin *forum* in the sense of a market, and thence a market price. The word “affeer,” to fix a price, also occurs, but is not to be confused with *affeir* or *effeir*, a term still in use in Scots legal phraseology, meaning to pertain. The word “fiars” thus signifies market prices, and is used in that sense in the Act 1584, c. 22 (“appoint certane and indifferent and comoun prices als neir as may be to the feiris of the cuntreis”).

One of the earliest objects of fiars was to fix the money conversion of rents payable in grain, where such conversion had not been fixed in perpetuity by the agreement of parties; and as the Sheriff was then a fiscal officer of the Crown, it was his duty to fix the prices at which such Crown rents were to be converted; hence, no doubt, the origin of the expression “Sheriff-fiars.”

SECTION 2.—PROCEDURE.

255. Owing to complaints of irregularities in the method of striking the fiars, an Act of Sederunt was passed in 1723 which provided that the Sheriff should strike the fiars before 1st March in each year. The procedure was to summon a jury of fifteen (of whom eight should be heritors), and also witnesses who had been engaged in sales of grain; but the jury could also act on their own knowledge. There is considerable doubt whether the Court of Session had any jurisdiction to pass this Act, as the authority of the Sheriff to strike the fiars must have

emanated from the Exchequer. In the case of *Howden v. Earl of Had-dington*,¹ the Court of Session refused to interfere where the fiars had been struck for a long period in a manner entirely different from the procedure of the Act of Sederunt.

256. The method of applying fiars prices for ascertaining the stipend of the parochial clergy was not invariable till the Act 48 Geo. III. c. 138 provided that stipend was to be converted into money at "the highest fiar prices." The term "highest" is applicable only when fiars are struck for more than one quality of grain; hence there is dissatisfaction amongst the clergy where only one quality of grain is valued. Applications have been presented in a number of counties to the Sheriff to have two qualities fixed where it is the practice to have only one valued. In some cases (in Inverness and in Forfar) this has been successful, but the tendency of the Courts is undoubtedly against any alteration on the existing practice, and there is a heavy onus on the petitioners to shew cause for the proposed change. An excellent statement of the reasons against change is given by the Sheriff of Roxburgh in a note to his interlocutor refusing the prayer of a petition for this purpose.²

In England, under the Tithe Commutation Acts, one set of values for the whole country is fixed by the Land Commissioners, and is based on an average of the preceding seven years.

SECTION 3.—STANDARDISATION.

257. The use of fiars prices for settling the rate of conversion into money of victual stipends of the parochial clergy is gradually ceasing through the operation of the Church of Scotland (Property and Endowments) Act, 1925.³ This Act provides (s. 1) that stipends hitherto depending upon fluctuations in the price of victual shall be payable only in money at a "standard" value to be determined under the Act. The standard value in money of a victual stipend is ascertained for each county by adding 5 per cent. to the county average value of that kind of victual for the fifty years 1873–1922 (s. 2). The county average values according to fiars prices for these fifty years of most kinds of victual are set out in the First Schedule to the Act, and in regard to any other kinds of victual are to be ascertained in accordance with the provisions set out in the Second Schedule. "Standardisation" takes place (s. 3) in each parish at the term of Martinmas first occurring not less than six months after the benefice becomes vacant (after the passing of the Act—28th May 1925), or earlier by election of the minister (ss. 3 and 4), or notification by the Church of Scotland General Trustees (ss. 3 and 5), who in the last case require to guarantee to the existing incumbent the amount of his stipend determined as formerly by reference to the price of victual.

¹ 1851, 13 D. 522.

² 1897, 4 S.L.T. No. 418.

³ 15 & 16 Geo. V. c. 33.

SECTION 4.—COMMUTATION OF FEU-DUTIES.

258. Again, under the Conveyancing (Scotland) Act, 1924,¹ feu-duties formerly payable or partly payable by reference to the price of grain, which have not before 31st December 1932 been commuted into a money payment, become at that date payable in money representing the average annual value of the feu-duty actually paid for the immediately preceding ten years.

¹ 14 & 15 Geo. V. c. 27, s. 12.

FIAT UT PETITUR.

See BILL CHAMBER.

FIDELITY INSURANCE.

See INSURANCE, FIDELITY.

FILIATION.

See AFFILIATION.

FILMS.

See CUSTOMS; THEATRES AND PLACES OF AMUSEMENT.

FINAL JUDGMENT.

See APPEAL; DECREE.

FINANCE ACTS.

See ESTATE AND OTHER DEATH DUTIES; INCOME TAX.

FINE.

See CRIME (PUNISHMENT).

FINE ARTS COPYRIGHT.

See COPYRIGHT.

FIREARMS.

See ARMED FORCES OF THE CROWN; CRIME; EXCISE.

FIRE INSURANCE.

See INSURANCE (FIRE).

FIRE, LOSS BY.

See CARRIAGE BY LAND; CARRIAGE BY SEA;
INNKEEPER; INSURANCE (FIRE).

FIRE-RAISING.

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FIREWORKS.

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FIRM NAME.

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FISHING.

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PART I.—SEA FISHERIES.

SECTION 1.—INTRODUCTORY.

259. The high seas are ownerless. The territorial sea, on the other hand, at least within the *mare clausum* and the three-mile limit,¹ is held to be the property of the Crown, to some extent in its own patrimonial interests, but principally in trust for the public rights of navigation

¹ *Mortensen v. Peters*, 1906, 5 Adam 121; 8 F. (J.) 93.

and fishing.¹ The right of navigation is superior to that of fishing.² The territorial waters of Scotland include (1) the *mare clausum*—land-locked gulfs, sea lochs, and inlets which are definitely enclosed; (2) a strip of sea within three miles of low-water mark along the general line of the coast; and (3) large bays and estuaries declared by statute or held by the Courts to be *intra fauces terræ*, e.g. the Moray Firth.³

SECTION 2.—WHITE FISHING.

SUBSECTION (1).—*Common Law Rights.*

260. The right of fishing for every kind of fish in the high seas is common to all nations, and is controlled either by custom or international conventions.⁴ No restriction is placed on the fish that may be taken or the methods by which they may be caught. The right of white fishing in the territorial waters of Scotland, including herring, is perfectly free to every subject of the realm.⁵ The term “white fishing” includes fishing for floating fish other than salmon and certain “royal fish,” and for non-floating fish other than mussels and oysters, which belong to the Crown or its grantee. The right may be exercised in any way not prohibited by statute.⁶ The right of white fishing includes the right to the use of the foreshore “for the purpose of conducting white fishing in a proper mode.”⁶ The foreshore is that part of the sea-shore or seabeach which lies between the limits of the high-water marks⁷ and low-water marks⁸ of ordinary spring tides. “Proper mode” does not include the use of stationary engines, except in the Solway, and there only so as not to interfere with the salmon fishing.

261. Herring and white fishers have a right to use waste and uncultivated lands for the space of 100 yards inland from high-water mark for certain purposes connected with their industry, e.g. pickling, drying, unloading and loading fish.⁹ No permanent right in such lands can be acquired, however, as they may be reclaimed.¹⁰ What is “waste or uncultivated land” is a question of circumstances in each case.¹¹ Herring

¹ Bankt. i. 3, 3; *Gammell v. Commrs. of Woods and Forests*, 1851, 13 D. 854; *affd.* 1859, 3 Macq. 419; *Gann v. Free Fishers of Whitstable*, 1864, 11 H.L.C. 192.

² *Grant v. Duke of Gordon*, 1782, 2 Pat. 582; *Colquhoun v. Duke of Montrose*, 1793, Mor. 12827; *Murray v. Earl of Selkirk*, 1821, 1 S. 106 (N.E. 111); *Gann v. Free Fishers of Whitstable*, *supra*; *Whitstable Free Fishers v. Foreman*, 1867, L.R. 2 C.P. 688; 1869, L.R. 4 H.L. 266, 283.

³ *Mortensen v. Peters*, 1906, 5 Adam 121; 8 F. (J.) 93.

⁴ Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45); International Convention Act, 1883 (46 & 47 Vict. c. 22); *Peters v. Olsen*, 1905, 7 F. (J.) 86; 4 Adam 608; *Mortensen v. Peters*, *supra*.

⁵ *M'Douall v. Lord Advocate*, 1873, 11 M. 688; *revd.* 1875, 2 R. (H.L.) 49; see *Gilmour v. Peterson*, 1901, 3 F. 569.

⁶ *M'Douall v. Lord Advocate*, *supra*.

⁷ *Bowie v. Marquis of Ailsa*, 1887, 14 R. 649; *Fisherrow Harbour Commrs. v. Musselburgh Real Estate Co., Ltd.*, 1903, 5 F. 387.

⁸ *Agnew v. Lord Advocate*, 1873, 11 M. 309.

⁹ Act 1705, c. 2; 11 Geo. III. c. 31, s. 11.

¹⁰ *Hoyle v. M'Cunn*, 1858, 21 D. 96.

¹¹ *Scott v. Greig*, 1887, 15 R. 27; *Campbeltown Shipbuilding Co. v. Robertson*, 1898, 25 R. 922; *Stephen v. Aiton*, 1875, 2 R. 470; *affd.* 1876, 3 R. (H.L.) 4.

fishers have also the free use of all natural ports and harbours without payment of dues,¹ but they are liable for all legal dues at piers or harbours built or artificially made.²

262. The right of white fishing in "public" rivers is perfectly free to all. A "public" river is one that is tidal and navigable.³ The right extends over the tidal portion only of the river,⁴ and it must be exercised in such a way as not to infringe salmon fishing rights or to interfere with navigation.

SUBSECTION (2).—*Statutes regulating White Fishing.*

263. Both prior to 1810 and since that year there have been many special enactments for the regulation of sea fisheries, and more especially herring fisheries. With the exception of the Act 1705, c. 2, all the earlier statutes have been repealed or have fallen into desuetude. As the principal statutes passed since 1810 will be more particularly dealt with under appropriate headings hereafter, it will be sufficient, at present, to indicate briefly what these statutes are. The Sea Fisheries Act, 1868,⁵ embodied a fishery convention of 1867 between Great Britain and France, which has never come into operation. In addition, the Act provided for the numbering, lighting, and registration of fishing boats and gear, and for the enforcement of fishing regulations. The Fishery Board (Scotland) Act, 1882,⁶ established the first Fishery Board for Scotland, transferred to it the powers and duties of the Board of British White Herring Fishery, and entrusted to it the superintendence and improvement of the coast and deep-sea fisheries of Scotland, and of the salmon fisheries. The Sea Fisheries Act, 1883,⁷ embodied and carried into effect the North Sea Convention of 1882 between Great Britain, Germany, Belgium, Denmark, France, and Holland. It amended, and in part repealed, the Act of 1868, and provided for exclusive fishing rights to each country's subjects in their own territorial waters, the registration, numbering, and lettering of fishing boats and gear, the maintenance of order among fishing boats and their crews, and the prohibition of engines for the destruction of nets, etc.⁸ The Sea Fisheries (Scotland) Amendment Act, 1885,⁹ gave wide powers to the Fishery Board for Scotland to make by-laws restricting or prohibiting "in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Isles," any method of fishing which the Board is satisfied is injurious. All by-laws must have the approval of the Secretary of

¹ 11 Geo. III. c. 31, s. 11.

² *Ibid.*, s. 12.

³ Bell's Prin., s. 648; *Grant v. Duke of Gordon*, 1781, Mor. 12820; 1782, 2 Pat. 582; *Colquhoun v. Duke of Montrose*, 1793, Mor. 12827; 1801, 4 Pat. 221; *Macbraire v. Mather*, 1871, 9 M. 913; *Colquhoun's Trs. v. Orr Ewing & Co.*, 1877, 4 R. 349; revd. 1877, 4 R. (H.L.) 116; *Bowie v. Marquis of Ailsa*, 1887, 14 R. 649.

⁴ *Lord Advocate v. Hamilton*, 1852, 1 Macq. 46.

⁵ 31 & 32 Vict. c. 45.

⁶ 45 & 46 Vict. c. 78.

⁷ 46 & 47 Vict. c. 22.

⁸ *Combe v. Renton*, 1886, 13 R. (J.C.) 67; 1 White 150; *Leslies v. Walker*, 1886, 14 R. 288.

⁹ 48 & 49 Vict. c. 70.

State for Scotland. The Act gave the Board power to require statistics of sea fisheries, and transferred to it the control of the oyster and mussel and crab and lobster fisheries, and clam and bait beds, hitherto exercised by the Board of Trade. The Act applies only to Scotland and the adjoining seas. The Sea Fishing-Boat (Scotland) Act, 1886,¹ deals with joint ownership, purchase, sale, and mortgaging of fishing boats. The Herring Fishery (Scotland) Act, 1889,² prohibits beam trawling or otter trawling within the three-mile limit and certain scheduled waters, except as permitted by by-laws of the Fishery Board for Scotland, and subject to any conditions or regulations in those by-laws. The penalty for a contravention of the Act is provided by s. 3 of an amending Act of 1890.³ The Sea Fisheries Regulation (Scotland) Act, 1895,⁴ reconstituted the Fishery Board, established Sea Fisheries Districts and Fishery District Committees, and made other important innovations.

SECTION 3.—FISHERY BOARD.

264. A Fishery Board for Scotland was first established in 1882.⁵ On it were conferred all the powers and duties of the Board of British White Herring Fishery under the Herring Fishery and Sea Fisheries Acts, as well as the superintendence of Salmon Fisheries and the powers and duties of the Salmon Fishery Acts. The Board is bound by the statute to take cognisance of all matters relating to the coast and deep-sea fisheries of Scotland, and to take such measures for their improvement as the funds under their administration and not otherwise appropriated may admit of, but without interfering with any existing public authority or private right. The Act does not apply to the Tweed.

265. Amongst the powers and duties transferred to the Board in 1882 the chief are ⁶:—

1. To make, revoke, and alter regulations under the statutes.⁷
2. To administer an annual grant of £2000 for piers and quays, and make rules therefor.⁸
3. To regulate barrels, branding, cran measures, etc.⁹
4. To fix a close time for herring fishing.¹⁰
5. To make regulations for the preservation of order in the herring fisheries.¹¹
6. To dispose of derelict nets and fishing gear.¹²
7. To sell or destroy forfeited boats, gear, etc.¹³

266. Although the Fishery Board (Scotland) Act, 1882, is still in force, the Board has been reconstituted by the Sea Fisheries Regulation

¹ 49 & 50 Vict. c. 53.

³ 53 & 54 Vict. c. 10.

⁴ 58 & 59 Vict. c. 42.

⁶ Tait, Game and Fishing Laws, 2nd ed., p. 318.

⁷ 55 Geo. III. c. 94, s. 41; 1 & 2 Geo. IV. c. 79, s. 3.

⁸ 5 Geo. IV. c. 64, ss. 9, 10.

¹⁰ 28 & 29 Vict. c. 22, s. 2.

¹² 23 & 24 Vict. c. 92, s. 10.

² 52 & 53 Vict. c. 23, s. 6.

⁵ 45 & 46 Vict. c. 78.

⁹ 48 & 49 Vict. c. 70, s. 9.

¹¹ 30 & 31 Vict. c. 52, s. 2.

¹³ *Ibid.*, s. 20.

(Scotland) Act, 1895,¹ and additional powers conferred upon it. The Board now consists of seven members (viz. three members, of whom one shall be the chairman of the Board, a second shall be the Sheriff of a county in Scotland, and the third shall be a person of skill in the branches of science concerned with the habits and food of fishes, and four members, who shall be representative of the various fishing interests of Scotland), to be appointed by His Majesty from time to time after the passing of the Act, on the recommendation of the Secretary for Scotland, and to hold office for five years, unless they sooner die or resign office. Four members are a quorum. The chairman or deputy-chairman, as the case may be, has a casting as well as a deliberative vote.² The Secretary for Scotland may appoint a scientific superintendent,³ and by the Act of 1882 provision is made for the appointment of a secretary.⁴

267. The following are the principal powers and duties which have been conferred on the Board since 1882⁵:—

1. To make by-laws regulating any mode of fishing in defined areas.⁶
2. To enforce numbering and lettering of fishing boats.⁷
3. To require statistics of sea fisheries.⁸
4. To make regulations as to the construction of herring barrels.⁹
5. To make loans to fishermen in crofting parishes.¹⁰
6. To regulate cran or quarter cran measures.¹¹
7. To make by-laws permitting trawling in defined areas and prohibiting it in the Moray Firth.¹²
8. To apply the grant of £3000 for constructing or improving harbours.¹³
9. To make by-laws restricting beam and otter trawling in areas within thirteen miles of the coast.¹⁴
10. To impose penalties not otherwise provided for by these by-laws.¹⁵
11. To issue licences for whaling and provide for the inspection of the whaling industry.¹⁶

268. In virtue of the powers conferred upon the Fishery Board in the Fisheries Acts, a number of by-laws have from time to time been passed. Some fifteen of these by-laws are still in force.

SECTION 4.—FISHERY DISTRICT COMMITTEES.

269. Provision is made by the Act of 1895 for the appointment of fishery district committees. On the application of a county council,

¹ 58 & 59 Vict. c. 42.

² *Ibid.*, s. 4 (1).

³ *Ibid.*, s. 4 (2).

⁴ 45 & 46 Vict. c. 78, s. 4 (3); 58 & 59 Vict. c. 42, s. 5.

⁵ See Tait, Game and Fishing Laws, 2nd ed., p. 319.

⁶ 48 & 49 Vict. c. 70, s. 4.

⁷ *Ibid.*, s. 5.

⁸ *Ibid.*, s. 6.

⁹ *Ibid.*, s. 9.

¹⁰ 49 & 50 Vict. c. 29, s. 32.

¹¹ 52 & 53 Vict. c. 23, s. 4.

¹² *Ibid.*, ss. 6, 7.

¹³ 57 & 58 Vict. c. 14, s. 1.

¹⁴ 58 & 59 Vict. c. 42, s. 10 (1).

¹⁵ *Ibid.*, s. 22 (3).

¹⁶ 7 Edw. VII. c. 41.

or of a town council, or of the police commissioners of a police burgh, the Secretary of State for Scotland may from time to time, by Order, create a sea fisheries district, including any part of the sea adjoining Scotland, or within the jurisdiction of the Fishery Board for Scotland. He may define the limits of the district and sea chargeable with any expenses under the Act, and provide for the constitution of a fishery district committee for the regulation of the sea fisheries carried on within the district. A draft of the Order must be published locally and a local inquiry held if any objection is taken to the Order. The Order must also be laid for thirty days before both Houses of Parliament while in session; and if either House within that period resolves that the whole or any part of the Order so made ought not to be in force, the same shall not have any force, without prejudice to the making of any other Order in its place.

270. In each fishery district there shall be constituted a fishery district committee, who shall be a committee composed of such number of members (in the Act referred to as ordinary members) of the county councils of the counties, and of the town councils of the royal or parliamentary burghs, and the burgh commissioners of the police burghs, comprised within the district, and appearing to have an interest, as may be fixed by the Order creating the district, or by any other Order of the Secretary for Scotland, with the addition of such number of fishery members representing the fishing interests of the district as may be directed by the Order, but not exceeding one-half in number of the whole committee. The fishery members may be distributed or apportioned among such portions of counties, and among such burghs and police burghs, as the Secretary for Scotland shall determine by the Order. A fishery district committee shall, subject to the provisions of the Order creating the sea fishery district, be a committee of a county council, or town council, or commissioners of a police burgh, or, if two or more of such bodies are represented upon it, shall be deemed to be a joint-committee of such bodies, and the provisions of the Local Government (Scotland) Act, 1889,¹ relative to joint committees, shall apply accordingly.² The ordinary members are to be appointed annually by the various councils.

271. The fishery members are to be elected every three years by all persons included in the expression "fishing interests."³ The county and burgh assessors are to prefix a distinctive mark to the number or name of any county or burgh elector whom they shall respectively consider to be entitled, or who shall satisfy them that he is entitled, to be included in the expression "fishing interests," and objection may be taken to the insertion or omission of the mark in the same way as in the case of any other entry in, or omission from, the register.⁴ The expression "fishing interests" includes "all persons engaged or employed

¹ 52 & 53 Vict. c. 50.

² *Ibid.*, s. 6 (3) (a).

³ 58 & 59 Vict. c. 42, s. 6 (1).

⁴ *Ibid.*, s. 6 (3) (b).

in the industry or business of sea fishing, excepting fisheries for salmon and fish of the salmon kind as defined by any Act relating to salmon, either as owners of fisheries or interests therein, fishermen, fishing-boat owners, smack owners, fish curers, fish merchants, or otherwise.”¹ Each voter has as many votes as there are members to be elected, but he may not give more than one vote to any candidate.²

272. The expenses of a fishery district committee, so far as sanctioned and payable by a county council, are to be levied and collected within the county (excluding police burghs), as an addition to the general purposes rate, and, so far as sanctioned and payable by a town council or burgh commissioners, by the town council, acting as such or as police commissioners, and by the burgh commissioners, as an addition to the burgh general assessment, or, where there is no burgh general assessment, to any other available assessment.³ The Fishery Board is to convene, at least once a year, a meeting of not less than one representative nominated for that year by each fishery district committee, to confer with the Fishery Board and for consultative purposes, on matters relating to the Act.

273. A fishery district committee may, from time to time, subject to such regulations as may be made in that behalf by the Fishery Board, impose penalties, and also make by-laws to be observed within their district, for all or any of the following purposes, namely:—(1) For restricting or prohibiting, either absolutely or subject to such regulations as may be provided by the by-laws, any method of fishing for sea fish, or the use of any instrument for fishing for sea fish, and for determining the size of mesh, form, and dimensions of any instrument of fishing for sea fish; (2) for prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing; and (3) for repealing or amending any by-law made by the fishery district committee in pursuance of the Act.⁴ Sec. 18 of the Act saves all orders made under the Sea Fisheries Act, 1868.⁵ A district committee may appoint fishery officers, who are to have certain powers of search and seizure, and are to be deemed police constables, for the enforcement of by-laws.⁶ The Board may also employ officers and vessels for the protection of sea fisheries;⁷ and any Sheriff or two justices, upon information on oath, may grant warrant to enter suspected places, provided that the warrant shall not continue in force for more than one week.⁸ All by-laws must be confirmed by the Secretary for Scotland,⁹ and all prosecutions may be under the Summary Jurisdiction Acts.¹⁰ In places where no fishery district committee has been constituted, the Fishery Board has all the powers given in the Act to district committees.¹¹ The Board may employ the grant given under the Act, 5 Geo. IV. c. 64,

¹ 58 & 59 Vict. c. 42, s. 28.

² *Ibid.*, s. 6 (3) (c).

³ *Ibid.*, s. 6 (6).

⁴ *Ibid.*, s. 8.

⁵ 31 & 32 Vict. c. 45.

⁶ 58 & 59 Vict. c. 42, s. 19.

⁷ *Ibid.*, s. 20.

⁸ *Ibid.*, s. 21.

⁹ *Ibid.*, s. 22.

¹⁰ *Ibid.*, s. 23.

¹¹ *Ibid.*, s. 26.

as "security for obtaining a loan from the Public Works Loan Commissioners."

SECTION 5.—TRAWLING.

SUBSECTION (1).—*General Regulations.*

274. Trawling is the name given to the method of catching fish by means of mechanism operating at the bottom of the sea. Trawling is regulated by statute and by by-laws made by the Fishery Board, which recognise and deal with three modes of trawling, viz. beam trawling, seine trawling, and otter trawling. Trawl fishermen, when in sight of drift-net or long-line fishermen, must take all necessary steps to avoid doing injury to the latter.¹ Where damage is caused, the responsibility shall lie on the trawlers, unless they can prove that they were under stress of compulsory circumstance, or that the loss sustained did not result from their fault.²

275. By the Sea Fisheries (Scotland) Amendment Act, 1885,³ it is provided that when the Fishery Board are satisfied that any mode of fishing in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands, is injurious to any kind of sea fishing within that part, or where it appears to the Board desirable to make experiments or observations with the view of ascertaining whether any particular mode of fishing is injurious, or for the purposes of fish culture or experiments in fish culture, the Board may make by-laws for restricting or prohibiting, either entirely or subject to such regulations as may be provided by the by-laws, any method of fishing for sea fish within the said part, during such time or times as they think fit, and may from time to time make by-laws for altering or revoking any such by-laws. Provision is made for confirmation of such by-laws by the Secretary of State for Scotland, notices, advertisement, objections and hearing thereon, and publication in the *Edinburgh Gazette*, and in such further mode as the Secretary of State may direct.³ Any person contravening a by-law duly confirmed shall be guilty of an offence under the Sea Fisheries Act, 1883, and shall be liable on summary conviction to a fine not exceeding £100, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction.

SUBSECTION (2).—*Lettering and Numbering of Trawlers.*

276. Sec. 5 of the Act deals with trawlers, and provides that every British sea-fishing boat propelled by steam, fishing in any part of the sea adjoining Scotland, shall, in addition to having the number and letters painted on the bow in manner provided by the Sea Fisheries

¹ 46 & 47 Vict. c. 22, Schedule 1, 19.

² *Combe v. Renton*, 1886, 13 R. (J.) 67; 1 White 150; *Leslies v. Walker*, 1886, 14 R. 288; *Masson v. Nicolson*, 1892, 20 R. 176.

³ 48 & 49 Vict. c. 70, s. 4.

Act, 1883, have the initial letter or letters of the port to which it belongs, and the registry number in the series of numbers for that port, painted in white oil-colour on a black ground, on the funnel twelve inches from the top, and on the quarter three or four inches below the gunwale and so as to be clearly visible, of the dimensions prescribed for the letters and numbers on the bow by the regulations in force for the time being for the lettering, numbering, and registering of British sea-fishing boats under the Sea Fisheries Acts or any Acts amending the same. This section shall be enforced in the same manner as if it were contained in such regulations. It is the duty of the Board to enforce the provisions of the Sea Fisheries Acts, and of any Orders in Council following thereon, with respect to the numbering and lettering of fishing boats, by directing their officers, being sea-fishery officers, to use the powers in that behalf conferred upon sea-fishery officers by the said Acts and Orders in Council.

SUBSECTION (3).—*Restriction of Beam, Otter, and Seine Trawling.*

277. The Herring Fishery (Scotland) Act, 1889,¹ prohibits beam trawling and otter trawling within three miles of low-water mark of any part of the coast of Scotland and within certain scheduled waters, including the Firths of Clyde and Forth, the Dornoch Firth, and certain parts of the Moray Firth, except between such points on the coast or within such other defined areas as may be permitted by by-laws of the Fishery Board, and subject to any conditions or regulations made by these by-laws. The section does not apply to the Solway Firth or to the Pentland Firth; nor are its provisions in any way to affect the powers which the Fishery Board has under s. 4 of the Sea Fisheries (Scotland) Act, 1885.² It is to be observed that the prohibited area includes the space between high-water mark and low-water mark.³ The penalty for a contravention of this enactment, provided by s. 3 of a later and amending Act, the Herring Fishery (Scotland) Act Amendment Act, 1890,⁴ is "a fine not exceeding £100, and, failing immediate payment, imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of this section, shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts." A "net" includes, in the case of otter trawling within the prohibited area, the otter board and the warps.⁵ A net set or attempted to be set may be seized before conviction.⁶

¹ 52 & 53 Vict. c. 23, s. 6 (1).

² *Whyte v. Thomson*, 1897, 24 R. (J.) 55; 2 Adam 305.

³ *Rankin v. Wright*, 1901, 4 F. (J.) 5; 3 Adam 483.

⁴ *Pyper v. Ingram*, 1901, 3 F. 514.

⁵ 48 & 49 Vict. c. 70.

⁶ 53 & 54 Vict. c. 10, s. 3.

278. It is further provided by the 1889 Act¹ that the Fishery Board may by by-laws prohibit these methods within a line drawn from Duncansbay Head in Caithness to Rattray Point in Aberdeenshire, in any area or areas to be defined in such by-laws, and may from time to time make, alter, or revoke the by-laws it makes under the section. A by-law made closing this entire area has been held to be within the powers of the Board,² and has been held to apply to foreign trawlers.³ A fisherman is always presumed to know that he is within prohibited waters;⁴ and it is no defence that he entered a prohibited area on the instructions of a superior officer.⁵ The penalty for a contravention of the enactment is provided by the Sea Fisheries Regulation (Scotland) Act, 1895.⁶ It is unlawful to land or sell in Scotland fish caught in contravention of the Herring Fishery (Scotland) Act, 1889, or of any by-law thereunder.⁷ Superintendents and other officers employed in the execution of the Herring Fishery (Scotland) Act have powers to prevent the landing and sale of fish so caught, whether by British subjects or by foreigners.⁸ The Trawling in Prohibited Areas Prevention Act, 1909,⁹ extends the prohibition to the United Kingdom. Fish caught in prohibited waters are to be included amongst the articles in the Customs table of prohibitions and restrictions.

279. Power to prohibit seine trawling in any of the areas within the limits specified in s. 6 of the Herring Fishery (Scotland) Act, 1889, is conferred upon the Fishery Board by s. 9 (1) of the Sea Fisheries Regulation (Scotland) Act, 1895. The penalty for a breach of any by-law made under this section is a fine not exceeding £5 for the first offence, and not exceeding £20 for the second or subsequent offence, and seizure and destruction of nets. In the event of no conviction, nets have to be returned and compensation paid for any loss or damage occasioned to the net by such seizure.

280. Under the same Act of 1895 the Fishery Board's powers of prohibiting beam and otter trawling are extended to any area within thirteen miles of the coast of Scotland, subject to the following conditions:—

1. The powers shall not be exercised in respect to any areas within thirteen miles of the coast of England, Ireland, or the Isle of Man.
2. By-laws made by the Fishery Board under the section cannot be confirmed by the Secretary of State for Scotland until a local inquiry has been held.

¹ 52 & 53 Vict. c. 23, s. 7 (1).

² *Wilson v. Rust*, 1896, 23 R. (J.) 56; 2 Adam 114.

³ *Peters v. Olsen*, 1905, 7 F. (J.) 84; 4 Adam 608.

⁴ *Mortensen v. Peters*, 1906, 8 F. (J.) 93; 5 Adam 121.

⁵ *Gordon v. Shaw*, 1908, 1908 S.C. (J.) 17; 5 Adam 469.

⁶ 58 & 59 Vict. c. 42, s. 10 (4).

⁷ 52 & 53 Vict. c. 23, ss. 8, 9.

⁸ *Poel v. Lord Advocate* (O.H.), 1899, 1 F. 823; 1898, 35 S.L.R. 637.

⁹ 9 Edw. VII. c. 8.

3. No area of sea within the thirteen-mile limit is to be deemed to be under British jurisdiction unless the powers conferred shall have been accepted as binding on their own subjects by all the States signatories of the North Sea Fishing Convention, 1882.

Any person guilty of a contravention of a by-law made under the section is subject to a penalty of £100, and failing immediate payment of the fine, to imprisonment for a term not exceeding sixty days. Provision is made for the seizure and destruction of nets. Where no conviction follows, however, nets seized are to be returned, and compensation made for any loss or damage thereto by seizure.¹ Failing payment by a certain date, named in the conviction, of the fine imposed upon the person or persons convicted, decree therefor may be pronounced against the owner or owners of the offending vessel. When such a decree is pronounced, the person convicted is relieved from the conviction, and from all penalties attaching thereto.

SUBSECTION (4).—*Prosecutions.*

281. Prosecutions under the Herring Fisheries Acts are conducted under the Summary Jurisdiction Act, 1908,² and the Criminal Procedure Act, 1887. Offenders are within the jurisdiction of the Sheriffs of a county or counties adjacent to where the offence is committed, and the Sheriff's jurisdiction extends to a distance of ten miles from the coast.³ The instance of a procurator-fiscal of a Sheriff Court is a good instance.²

SECTION 6.—HERRING FISHING.

SUBSECTION (1).—*Size of Nets.*

282. Subject to the restrictions imposed by the Sea Fisheries Acts,⁴ it is lawful to fish for and take herrings and herring fry at all places on the coasts of Scotland, in any manner of way, and by means of any kind of net, the meshes of which are not less than one inch from knot to knot.

SUBSECTION (2).—*Close Times.*

283. No herring nets may be set or hauled within two leagues of the coast of Scotland between the hours of 12 p.m. on Saturday and 12 p.m. on Sunday. Where nets have been set before 12 p.m. on Saturday, it is not permissible to haul them before 12 p.m. on Sunday. A conviction for contravention of the "close time" will result in the forfeiture of nets.

284. By s. 5 of the 1889 Act it is provided that a close time for herring fishing extending between sunrise and one hour before sunset on any day between 1st June and 1st October, and between sunrise

¹ Sec. 10 (4).

² *Nicholson v. Yoole*, 1885, 12 R. (J.) 46; 5 Coup. 628.

³ 48 Geo. III. c. 110, s. 60.

⁴ *Ibid.*, s. 12; 30 & 31 Vict. c. 52, s. 1.

on Saturday morning and one hour before sunset on Monday evening, shall be in operation on the West Coast of Scotland between Ardnarmurchan Point and the Mull of Galloway. Penalties are imposed for infringements of the statutory close time.

SUBSECTION (3).—*Barrels and Branding.*

285. All barrels or half-barrels in which herrings are packed must contain thirty-two or sixteen gallons English wine measure respectively under pain of forfeiture of the barrels ¹ and herrings.² Regulations have been made by the Fishery Board, under the powers conferred by various Acts, regarding the materials to be used in the construction of barrels, their hooping, and the markings on the barrels. Fir wood may now be used in making barrels. The most recent regulations governing the construction and capacity of barrels are the Herring Barrel and Branding Regulations,³ issued on 20th April 1928, which provide, *inter alia*, for the following matters: (1) Staves and ends; (2) hooping methods; (3) tightness; (4) capacity; (5) examination.

286. Branding is carried out by officers of the Fishery Board, who, under the Board's regulations, affix to each barrel the brand denoting the class of herrings to which it belongs. There are seven classes of herrings. The Regulations of 1928 provide for the markings to be put on barrels which are filled or intended to be filled with cured herrings intended for the brand; fixing the classes of herrings, including broken fish; the gutting, curing, and packing of herrings within twenty-four hours after they are caught; the examination of the barrels; the branding of barrels after examination; and the qualification of the various brands. It is pointed out in the Regulations that the brand is merely a guarantee that the herrings have been examined in accordance with the Regulations, and found to be of the quality indicated by the brand at the time of examination. The penalty for fraudulent branding is a fine not exceeding £50, or not more than six months' imprisonment.⁴ The officers of the Board are not liable for acts done in the execution of their duties, unless done maliciously.⁵

SUBSECTION (4).—*Measures.*

287. The Herring Fishery (Scotland) Act, 1889,⁶ enacts that the only legal measures for use in buying, selling, delivering, or receiving fresh herrings in the Scottish herring fishery shall be crans and quarter crans, made and branded or otherwise marked in accordance with any

¹ 55 Geo. III. c. 94, ss. 12, 40.

² See *Loudon v. Ingram*, 1884, 11 R. (J.) 57; 5 Coup. 458; *Bremner v. Doull*, 1890, 17 R. (J.) 31; 2 White 440.

³ 20th April 1928, S.R. & O. 1928, Fishery, Scotland.

⁴ 48 Geo. III. 110, ss. 50, 51; 14 & 15 Vict. c. 26, s. 3.

⁵ 48 Geo. III. 110, s. 59.

⁶ 52 & 53 Vict. c. 23, s. 4.

regulations of the Fishery Board for the time being in force. Any person using any other measure is liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a minimum fine of £5 for a first offence, and £20 for a second or subsequent offence, with forfeiture of the measure used. Herrings may still be sold by weight, or number, or in bulk.

SUBSECTION (5).—*First-aid Appliances in Curing Stations.*

288. By the Herring Curing (Scotland) Welfare Order, 1926,¹ provision must be made for the establishment in curing factories and workshops of a first-aid dressing station with a trained person in charge not more than 440 yards from the factory or workshop, and a first-aid box on the premises, also in charge of a trained person and readily available during working hours. Facilities for washing must also be provided.

SECTION 7.—WHALE FISHING.

289. Whales of large size cast up on the seashore or caught within territorial waters are "Royal Fish," and in theory belong to the Crown.² Whales of smaller size, captured within the territorial waters, belong to the captor.³ A local custom in the Shetland Isles, whereby proprietors on whose lands a whale had run aground were entitled to take one-third of it as their share, was declared to be unjust and unreasonable, and to have no force of law.⁴ Whales caught in the high seas belong to the captor—a general rule which has to some extent been modified—provided the capture has been complete or the fish mortally wounded.⁵ A rule of "fast and loose" has been established, whereby a person who first harpoons a whale and retains his hold is the proprietor of the fish. If without interference from another person the fish breaks loose, it becomes the property of the person who next harpoons it and holds it fast.⁶

290. Whale fishing in Scotland is now regulated by the Whale Fisheries (Scotland) Act, 1907.⁷ Licences, issued by the Fishery Board after due advertisement, must be obtained permitting anyone to land whales and manufacture oil. Failure to obtain a licence is punishable, on summary conviction, by a fine not exceeding £500. Any breach of the licence may result in its cancellation or suspension.

¹ 1926, S.R. & O., No. 535.

² Hale, *De Juris Maris*, p. 43; Stair, ii. 1, 5; Ersk. ii. 1, 10; Ferguson, *Water Rights*, p. 29.

³ Bell's Dict. *voce* "Whales."

⁴ *Bruce v. Smith*, 1890, 17 R. 1000.

⁵ Stair, ii. 1, 33.

⁶ Bell's Prin., s. 1289; *Row v. Addison & Sons*, 1794, 3 Pat. 334; *Littledale v. Scaith*, 1788, 1 Taunt. 243 n.; *Fennings v. Lord Grenville*, 1808, 1 Taunt. 241; *Hutcheson v. Dundee Whale Fishing Co.*, 1830, 5 Murray 164; *Hogarth v. Jackson*, 1827, 1 M. & M. 58; *Skinner v. Chapman*, 1827, 1 M. & M. 59; *Aberdeen Arctic Co. v. Sutter*, 1862, 4 Macq. 355.

⁷ 7 Edw. VII. c. 41.

SECTION 8.—OYSTERS AND MUSSELS.

SUBSECTION (1).—*Title.*

291. The right to take oysters and mussels within territorial waters is *inter regalia*, and belongs as a patrimonial right to the Crown;¹ but the public may take oysters and mussels by the tolerance of the Crown where access to the foreshore is not forbidden. The right extends over the coasts, bays, and public rivers of Scotland. Outside the limits of the territorial sea, or if found within the limits detached from scalps or beds, they are common to all. The Crown has no right to scalps or beds in private rivers.²

292. The right to take oysters and mussels may, however, be acquired by private persons. It may be the subject of an express grant by the Crown, or it may be established by prescription on a barony title *cum piscationibus*, or even on a non-barony title *cum piscationibus*.³ A barony title without a clause of fishing will not, it is thought, afford a foundation for establishing the right.⁴ Exclusive possession for a period of seven years on a title not inconsistent with it will ground a possessory interdict.⁵ A grant to magistrates, burgesses, citizens, inhabitants, and community of a royal burgh forms part of the common good, but the fishermen of the burgh have the right to an adequate supply of bait at preferential rates.⁶ The grantee must not, in the exercise of his right, interfere with navigation, nor with the public right to fish for white floating fish.⁷ The public right must be exercised in such a way as not to injure the scalps or beds.

SUBSECTION (2).—*Statutory Regulation.*

293. Oyster and mussel fishing has been the subject of statutory regulation.⁸ The Sea Fisheries Act, 1868,⁹ provides that all oysters and mussels in or on any oyster or mussel bed within the limits of a several oyster and mussel fishing, and all oysters in or on any privately owned oyster bed, sufficiently marked out and known as such, shall be the absolute property of the grantee or owner whether still in the bed or removed. Any person who wilfully and knowingly takes oysters or

¹ *Duchess of Sutherland v. Watson*, 1868, 6 M. 199; *Parker v. Lord Advocate*, 1902, 4 F. 698; *affd.* 1904, 6 F. (O.H.) 37.

² *Grant v. Rose*, 1764, Mor. 12801; *affd.* 1769, 6 Pat. 779.

³ Bell's Prin., s. 646; *Grant v. Rose*, *supra*; *Ramsay v. Kellies*, 1775, 5 Bell's Supp. 445; Hailes, p. 722; *Mailland v. M'Lelland*, 1860, 23 D. 216; *Duke of Portland v. Gray*, 1832, 11 S. 14; *Mags. of St. Andrews v. Wilson*, 1869, 7 M. 1105.

⁴ *Duchess of Sutherland v. Watson*, *supra*; *Lindsay v. Robertson*, 1867, 5 M. 864; 1868, 6 M. 889; 1868, 7 M. 239.

⁵ *Erskine v. Mags. of Montrose*, 1819, Hume 558; see Rankine, Land-Ownership, p. 238; *Ramsay v. Kellies*, *supra*; *Agnew v. Mags. of Stranraer*, 1822, 2 S. 42 (N.E. 36); *Grant v. Brodie*, 1769, 6 Pat. (Supp.) 779; *Wallace v. Stewart*, 1869, 6 S.L.R. 374.

⁶ *Mags. of St. Andrews v. Wilson*, 1869, 7 M. 1105; *Chisholm v. Black*, 1871, 2 Coup. 49.

⁷ 3 & 4 Vict. c. 74, s. 3.

⁸ 29 & 30 Vict. c. 85; 31 & 32 Vict. c. 45.

⁹ 31 & 32 Vict. c. 45, ss. 51, 52.

mussels from scalps which do not belong to him, is guilty of theft.¹ The use for catching floating fish of any implement except a line or net is prohibited,² and it must be so used as not to disturb or injure the beds. Dredging, except under a lawful authority for improving the navigation, depositing of any ballast, rubbish, or any other substance on the beds, placing any apparatus or thing prejudicial on the beds, except for a lawful purpose of navigation or anchorage, and disturbing or injuring the beds in any way, except as aforesaid, are all prohibited. The beds must be marked out and known as such, to obtain the protection of the Act.

294. Under the Sea Fisheries Regulation (Scotland) Act, 1895,³ extended powers are given to the Fishery Board to regulate oyster and mussel fishing. Fishery district committees may (s. 8), subject to the regulations of the Fishery Board, impose penalties and make by-laws to be observed within their district (1) for constituting within their district any district of oyster cultivation for the purposes of s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877;⁴ (2) for repealing or amending any order made under s. 10 of that Act; (3) for the regulation, protection, and development of fisheries for all or any specified kinds of shell-fish. Any such by-laws shall provide, amongst other things, for (a) the fixing of the sizes and conditions at which shell-fish may not be removed from a fishery, and the mode of determining such sizes; (b) the obligation to redeposit in specified localities any shell-fish the removal or possession of which is prohibited by, or in pursuance of, any Act of Parliament; (c) the protection of shell-fish laid down for breeding purposes; (d) the protection of culch and other material laid down for the reception of spat, that is to say, of the spawn or young of any kinds of shell-fish; and (e) the obligation to redeposit such culch or other material in specified localities. A fishery district committee has power to stock or restock any public fishery for shell-fish.

295. The Fishery Board is to draw up a list of mussel or clam fisheries or beds or scalps, specifying their situation and limits, and the names of the owners or reputed owners (s. 11). The Board may lease or purchase any mussel or clam fisheries or beds or scalps; and in the event of purchase otherwise than by agreement, the provisions of the Lands Clauses Act are to apply (s. 12). A fishery district committee may, subject to the regulations of the Board, impose penalties and make by-laws for the establishment and maintenance or improvement of scalps, in certain specified ways, including the letting or lease of any scalp, etc., by the Fishery Board (s. 13). The Fishery Board or their tenants, where they have acquired a title under the Act to scalps, etc., shall, subject to the rights of the Crown and its grantees, have the exclusive right of depositing, propagating, dredging, and taking

¹ 3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92; *Chisholm v. Black*, 1871, 2 Coup. 49; *Garrett v. Edgar*, 1866, 5 Irv. 259.

² 31 & 32 Vict. c. 45, s. 53.

³ 58 & 59 Vict. c. 42.

⁴ 40 & 41 Vict. c. 42.

mussels and clams within the limits of each fishery district, "and in the exercise of that right may, within the limits of the district, make and maintain mussel or clam fisheries and beds or scalps, and collect and remove the same from place to place, and deposit the same as and when they think fit, and do all other things which they think proper for obtaining, storing, and disposing of the produce of their fishery: Provided always that, when the Fishery Board or their sublessees or tenants hold any mussel or clam fishery or bed or scalp on lease, they shall in no case exceed the powers conferred upon them in their respective leases" (s. 14). The Board or their sublessees or tenants may impose tolls and royalties, subject to the rights of the Crown and its grantees, upon persons dredging and taking mussels or clams, to be applied for the benefit of the fishery only (s. 15). The Board may also borrow from the Public Works Loan Commissioners, upon the security of the tolls and royalties, with the consent of the Secretary for Scotland, for the purchase, lease, maintenance, or regulation of any mussel or clam fisheries or beds or scalps, or for the cultivation of mussels or clams generally (s. 16).

296. Any person within the limits of a fishery district, other than the Crown and its grantees, and the Fishery Board or their sublessees or tenants, is prohibited from fishing on or near a scalp, etc., with anything but hook and line, or a net solely for catching floating fish. Dredging, except under a lawful authority, for improving navigation; depositing ballast or rubbish; and the use of any instrument likely to cause injury, except for the purpose of navigation or anchorage, are forbidden (s. 17). The close time for "deep-sea oysters" is from 15th June to 4th August, and for all other oysters from 14th May to 4th August.¹ The Fishery Board have power to restrict or prohibit, for a limited period not exceeding one year, the dredging or taking of oysters on any bank or bed.²

SECTION 9.—CRABS AND LOBSTERS.

297. The right to take crabs is a public one. Lobster fishing also would appear to be a public right.³ There is a close time for lobster fishing which extends from 1st June to 1st September, during which no person may take, kill, or destroy any lobsters on the seacoast of Scotland.⁴ Nor may anyone have in his possession, or sell, any lobster less than 8 inches long from tip of beak to end of tail.⁵ Taking, having in possession, selling or buying any crab less than 4½ inches across the broadest part of the back, or crabs in certain states is an offence, unless the Court is satisfied that the crabs were to be used as bait.⁶ The Secretary of State for Scotland has power to restrict or prohibit fishing for crabs or lobsters either for a period of years or for a certain period in each year.⁶ Sec. 8 (c) of the Sea Fisheries Regulation

¹ 40 & 41 Vict. c. 42.

² *Duke of Portland v. Gray*, 1832, 11 S. 14.

³ 40 & 41 Vict. c. 42, s. 9.

⁴ 48 & 49 Vict. c. 70, s. 11.

⁵ 9 Geo. II. c. 33, s. 4.

⁶ *Ibid.*, s. 8.

(Scotland) Act, 1895,¹ provides that fishery district committees (or where there is none, the Fishery Board) may make regulations for "directing that the proviso to s. 8 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877,² which permits edible crabs in certain conditions or under a certain size to be taken or be in the possession of any person, if those crabs are intended for bait for fishing, shall not apply." And by s. 8 (1) (d) of the 1895 Act powers of search, seizure, and destruction are given to authorities in like manner as if the crabs and lobsters were unfit for human food.

PART II.—SALMON AND TROUT FISHING.

SECTION 1.—RIGHT OF SALMON FISHING.

SUBSECTION (1).—*Nature of Right.*

298. The right of salmon fishing in the rivers of Scotland and in the territorial waters around her coasts belongs to the Crown as a separate heritable estate, and forms part of the *patrimonium principis*,³ except in Orkney and Shetland, where the feudal law does not apply.⁴ The Crown may make a grant of salmon fishings to any subject of the realm, either with the land or separately; in the latter case the grant implies, as a pertinent, the right of access to and use of the banks of a river, foreshore, or beach for the purpose of salmon fishing.⁵ The Crown's right to salmon fishing extends to every lawful method of catching the fish.

SUBSECTION (2).—*Title.*

299. The right to salmon fishing must in every case originate in a grant from the Crown. The grant may be one of salmon fishings alone.⁶ It may be a direct grant *cum piscatione salmonum*.⁷ The conveyance must be in the dispositive clause of the charter. A grant of pertinents does not include the right to salmon fishings which is in itself an independent feudal estate; nor is a clause of "fishings" in the *tenendas* clause of any avail, at least in the ordinary case, though such a clause, combined with a grant of pertinents in the dispositive clause of a charter from a subject-superior, has been held to be a valid title upon which to found prescription.⁸

¹ 58 & 59 Vict. c. 42.

² 40 & 41 Vict. c. 42, s. 8.

³ Stair, ii. 3, 69; Ersk. Inst. ii. 6, 15; Bell's Prin., s. 671; *Commrs. of Woods and Forests v. Gammell*, 1851, 13 D. 854; *affd.* 1859, 5 Macq. 419.

⁴ *Lord Advocate v. Balfour*, 1907 S.C. 1360; *Smith v. Lerwick Harbour Trs.*, 1903, 5 F. 680.

⁵ *Miller v. Blair*, 1825, 4 S. 214; *Berry v. Wilson*, 1841, 4 D. 139; *Lord Advocate v. Sharp*, 1878, 6 R. 108; *Anderson v. Anderson*, 1867, 6 M. 117; 5 Irv. 499.

⁶ *Hogarth v. Grant*, 1901, 8 S.L.T. 324.

⁷ *Mackenzie v. Davidson*, 1841, 3 D. 646; *Earl of Galloway v. Birrel*, 1868, 5 S.L.R. 113; *Duke of Argyll v. Campbell*, 1891, 18 R. 1094; *Gray v. Richardson*, 1877, 4 R. (H.L.) 76; 3 App. Cas. 1; *Maxwell v. Lamont*, 1903, 6 F. 245.

⁸ *Sinclair v. Lord Advocate*, 1867, 5 M. (H.L.) 97; *M'Culloch v. Lord Advocate*, 1874, 2 R. 27.

300. The right to salmon fishing may also be established by a grant *cum piscationibus* followed by prescriptive possession of salmon fishings.¹ A good title may be prescribed on such a clause, even in a charter by a subject-superior, if it can be shewn from the earlier titles that the right to the fishings was originally granted by the Crown.² A barony title, whether or not such title expressly states *cum piscationibus*, followed by prescriptive possession of the salmon fishings by the holder of such a title, will also establish the right.³ Where a barony is divided, the salmon fishings go with that part of the barony to which they pertain.⁴ And when two or more persons, having different titles, lay claim to the same salmon fishing, the earlier title is preferred.⁵ Where the right is gained by prescription, it is limited to the extent of possession,⁶ but prescription dates from the granting of the title on which the possession followed. The title on which possession has followed has preference.⁷ The possession of salmon fishings on a barony title in certain parts of a river was held sufficient to prescribe the right to the whole river, so far as within the barony.⁸ The possession must be attributable to the grant, and in accordance with it, and must have been for the benefit of the person who claims the right.⁹ It must be exclusive, and must be by net and coble or some other legal method of a clear and unequivocal kind.¹⁰ Rod fishing was at one time thought to be ineffectual as a proof of possession,¹¹ but the modern tendency is to regard rod fishing, so long as it is not limited merely to occasional angling or is practised in competition with net and coble fishing, as sufficient where it may be regarded as the higher and more valuable method, the net and coble method being impracticable or unprofitable.¹²

SUBSECTION (3).—*Limits of Exercise of Right.*

301. Where the right is held by different proprietors on opposite banks of a river, the rule of bounding charters applies, at least in

¹ *Maxwell*, 1628, Mor. 14250; *Forbes v. Udney*, 1701, Mor. 7812, 14250; *Duke of Queensberry v. Stormont*, 1773, Mor. 14251; *Duke of Sutherland v. Ross*, 1836, 14 S. 960; *Stuart v. M'Barnet*, 1868, 6 M. (H.L.) 123; *Ogston v. Stewart*, 1896, 23 R. (H.L.) 16.

² *Sinclair v. Lord Advocate*, 1867, 5 M. (H.L.) 97; *Stuart v. M'Barnet*, *supra*; *Earl of Zetland v. Glover Incorporation of Perth*, 1870, 8 M. (H.L.) 144.

³ *Nicol v. Lord Advocate*, 1868, 6 M. 972; *Duke of Richmond v. Earl of Seafield*, 1870, 8 M. 530; *Lord Advocate v. Cathcart*, 1871, 9 M. 744; *M'Douall v. Lord Advocate*, 1875, 2 R. (H.L.) 49.

⁴ *M'Culloch v. Lord Advocate*, 1874, 2 R. 27.

⁵ *Gray v. Richardson*, 1876, 3 R. 1031; *affd.* 1877, 4 R. (H.L.) 76.

⁶ *Lord Advocate v. Cathcart*, *supra*.

⁷ *Duke of Richmond v. Earl of Seafield*, *supra*; *Duke of Argyll v. Campbell*, 1891, 18 R. 1094.

⁸ *Lord Advocate v. Lord Lovat*, 1880, 7 R. (H.L.) 122.

⁹ *Carnegie*, 1777, Mor. 10611; *Duke of Argyll v. Campbell*, *supra*; *Ogston v. Stewart's Trs.*, 1893, 21 R. 282; *revd.* 1896, 23 R. (H.L.) 16.

¹⁰ *Anderson v. Anderson*, 1867, 5 M. 499; 6 M. 117; *Ramsay v. Duke of Roxburghe*, 1848, 10 D. 661; *Milne v. Smith*, 1850, 13 D. 112; *Maxwell v. Lamont*, 1903, 6 F. 245.

¹¹ *Duke of Sutherland v. Ross*, *supra*.

¹² *Duke of Richmond v. Earl of Seafield*, *supra*; *Earl of Dalhousie v. M'Inroy*, 1865, 3 M. 1165; *Stuart v. M'Barnet*, *supra*; *Warrant's Trs. v. Mackintosh*, 1890, 17 R. (H.L.) 13; *Duke of Roxburghe v. Waldie's Trs.*, 1879, 6 R. 663; *Lord Advocate v. Lord Lovat*, *supra*; *Maxwell v. Lamont*, *supra*.

large streams, and neither party is entitled to fish either with net or rod beyond the *medium filum*.¹ Each must use his own bank alone for the operations connected with the fishing. Where the proprietor of salmon fishings has no land on either bank of the river, he may use both for the purpose of landing his draw. In the case of smaller streams it is customary, with regard to net fishing, to arrange fishing on alternate days, or for alternate shots of the net.² It has not been expressly decided whether rod fishing beyond the *medium filum* is permissible,³ though in a recent case⁴ the opinion was expressed that the principles applicable to regulation of fishing rights between opposite proprietors as regards the *medium filum* of the river in the case of net fishing⁵ also apply to rod fishing. An opposite proprietor is not entitled to exercise his right of fishing *in æmulationem vicini*.⁴

302. A proprietor is not entitled to interfere with the *alveus* of the river even on his own side of the *medium filum*.⁶ He cannot make erections in the stream for any purpose, and an opposite proprietor does not require to prove damage, or probability of damage, in order to have the erection removed. In like manner the blasting and removal of boulders from the bed of the river to the injury of the opposite proprietor by altering the course of the river or interfering with its flow is prohibited.⁷ A proprietor may, however, restore the *alveus* on his own side to its original condition by artificial means when it has been disturbed by a flood.⁸ But the work must be carried out within a reasonable time.⁹ In such circumstances a proprietor may raise the bank of a river for greater security.¹⁰ A proprietor has the right to prohibit injurious interference with the quantity of water in the river,¹¹ and where a lower proprietor by abstracting more water than he is entitled to do interferes with the free passage of fish up the river he can be stopped. Pollution of the river may be objected to by any proprietor of a salmon fishing.¹²

¹ *Stuart v. M'Barnet*, *supra*; *Gray v. Mags. of Perth*, 1750, Mor. 12792; *revd.* 1757, 1 Pat. 645; *Milne v. Smith*, 1850, 13 D. 112; *Earl of Zetland v. Tennent's Trs.*, 1873, 11 M. 469; *Fraser v. Grant*, 1866, 4 M. 596; *Lord Monimusk v. Forbes*, 1623, Mor. 10840, 14264.

² *Mather v. Macbraire*, 1873, 11 M. 522; *Milne v. Smith*, *supra*; *Duke of Richmond v. Earl of Seafield*, 1870, 8 M. 530; *Earl of Zetland v. Tennent's Trs.*, *supra*.

³ *Somerville v. Smith*, 1859, 22 D. 279, per Lord Deas at p. 288.

⁴ *Campbell v. Muir*, 1908 S.C. 387.

⁵ *Earl of Zetland v. Tennent's Trs.*, *supra*.

⁶ *Colquhoun v. Duke of Montrose*, 1793, Mor. 12827, 14281; *Mather v. Macbraire*, 1873, 11 M. 522; *Duke of Roxburghe v. Waldie's Trs.*, 1879, 6 R. 663; *Robertson v. Foote & Co.*, 1879, 6 R. 1290; *Orr Ewing & Co. v. Colquhoun's Trs.*, 1877, 4 R. (H.L.) 116.

⁷ *Robertson v. Foote & Co.*, *supra*.

⁸ *Town of Nairn v. Lord Lyon*, 1739, Mor. 12779; *Duke of Sutherland v. Ross*, 1878, 5 R. (H.L.) 137; *Mather v. Macbraire*, 1873, 4 M. 522.

⁹ *Mags. of Aberdeen v. Menzies*, 1748, Mor. 12787.

¹⁰ *Duke of Sutherland v. Ross*, 1878, 5 R. (H.L.) 137.

¹¹ *Pirie & Sons, Ltd. v. Earl of Kintore*, 1906, 8 F. (H.L.) 16; see also *Duke of Roxburghe v. Waldie's Trs.*, 1879, 6 R. 663.

¹² *Moncrieff v. Perth Police Commrs.*, 1886, 13 R. 921; *Armistead v. Bowerman*, 1888, 15 R. 814; *Countess of Seafield v. Kemp*, 1899, 1 F. 402.

303. Salmon fishers must not interfere with navigation. On the other hand, the right of navigation must not be exercised in a way to cause unnecessary injury to salmon fishers.

304. The boundaries of salmon fishings between adjoining proprietors are usually determined by dropping a perpendicular from the boundary on the bank to the *medium filum* or a line representing the general course of the river or coast line.¹

305. Minor rights of salmon fishing may be feudalised, such as the "right and privilege of one tide's fishing of salmon yearly";² and a proprietor, while conveying a right of salmon fishing, may reserve to himself the right of fishing in a particular manner.³

SUBSECTION (4).—*Leases of Salmon Fishings.*

306. Salmon fishings are frequently the subject of lease. The net and rod fishings in the same water may be let to different persons, and a proprietor may reserve to himself the right of fishing by one method, which he may afterwards let to another.⁴ A lease of fishings carries with it all the lessor's rights, and the landlord's right of hypothec applies to it, and also to the produce of the fishing.⁵ Whether the hypothec applies to boats, nets, and other implements of fishing seems doubtful. A lease of salmon fishings, being a separate heritable estate, is protected against singular successors by the Act 1449, c. 17. It probably excludes subtenants and assignees without special mention.⁶

SECTION 2.—STATUTORY REGULATION OF SALMON FISHING.

SUBSECTION (1).—*Early Statutes.*

307. Of the many Scots statutes dealing with salmon fishing only five survive, the others having been repealed. The Act 1424, c. 11, directed all cruives and engines, set in fresh water where the sea fills and ebbs, which destroy the fry of all fishes, to be destroyed. The Act 1477, c. 73, provides that those who have cruives in fresh water shall keep the law "anent the setterdais slop," and that each heck of the cruives shall be three inches wide. Cruives are also the subject of the Act 1563, c. 68. The Act 1696, c. 33, enjoins "slops in dam dykes." Fishing by means of "pocknets, herry-water nets," and other engines or devices not expressly allowed by law is forbidden by the Act 1696, c. 33.

¹ Rankine, *Land-Ownership*, 4th ed., pp. 109, 313; *Keith v. Smythe*, 1884, 12 R. 66; *Stuart Gray v. Flemings & Richardson*, 1885, 12 R. 530; *Mags. of Tain v. Murray*, 1887, 15 R. 83.

² *Murray v. Peddie*, 1880, 7 R. 884.

³ *Duke of Richmond v. Earl of Seafield*, 1867, 5 M. 310.

⁴ *Gemmell v. Riddell*, 1847, 9 D. 727.

⁵ *Stair*, i. 13, 15; *Bankt.*, i. 17, 10; *Cumming v. Lumsden*, 1667, Mor. 6237; *Molison v. Smith & Nicol*, 1687, Mor. 6239; *Stewart, Fishings*, p. 163; Rankine, *Leases*, 3rd ed., p. 380.

⁶ *Earl of Fife v. Wilson*, 1864, 3 M. 323; *Mackintosh v. May*, 1895, 22 R. 345.

308. In 1828 the Act known as the Home Drummond Act,¹ which re-enacted the provisions contained in the Act 1477, c. 73, relative to the width of hecks in cruives and the Saturday slop, introduced a close time for salmon, and provided penalties for trespass in pursuit of salmon. The Salmon Fisheries (Scotland) Act, 1844,² prohibited fishing for salmon in inland waters and upon the seashore or within one mile of low-water mark without a legal right or permission from a proprietor.

SUBSECTION (2).—*The Salmon Fisheries Acts.*

309. The modern code of salmon fishing law will be found in the Salmon Fisheries (Scotland) Acts, 1862 to 1868, which are read and construed together as one Act. The 1862 Act³ provides a definition of "salmon," which includes salmon, grilse, sea trout, bull trout, smolts, parr, and other migratory fish of the salmon kind.⁴

310. Three Commissioners were appointed with powers to frame by-laws under the Act, now confirmed by s. 10 of the 1868 Act and embodied in schedules appended to the Act. Schedule A fixes the limits of fishery districts, the portions of the seacoast adjoining the estuary of any river to be included in the districts, and a point on each river marking the division between upper and lower proprietors. Schedule B fixes the limits dividing each river from the sea, and the limits of the Solway Firth. An annual close time for every district is fixed by Schedule C, and the regulations for the due observance of the weekly close time are set forth in Schedule D. Schedule E regulates the meshes of nets; Schedule F the construction and use of cruives; and Schedule G the construction of mill dams, lades, and waterwheels. The powers and duties of these Commissioners are now transferred to the Fishery Board.⁵

SUBSECTION (3).—*Close Times.*

311. Weekly and annual periods of close time were laid down by the Act. The weekly close time for every method of fishing except rod and line is thirty-six hours, from 6 p.m. on Saturday to 6 a.m. on Monday.⁶ The weekly close time for rod fishing, except for the Tweed, is from midnight on Saturday to midnight on Sunday, and does not include the six hours after 6 p.m. on Saturday or the six hours before 6 a.m. on Monday.⁷ Schedule D of the 1868 Act contains the provisions for regulating the weekly close time with regard to stake and bag nets: (1) In each and every stake weir or stake net a clear opening of at least

¹ 9 Geo. IV. c. 39.

² 7 & 8 Vict. c. 95.

³ 25 & 26 Vict. c. 97, s. 2.

⁴ See *Lord Advocate v. Balfour* (O.H.), 1907 S.C. 1360; *Blair v. Miller*, 1869, 14 Journ. of Juris. 625; *Cooper v. Spence*, 1874, 19 Journ. of Juris. 613; 31 & 32 Vict. c. 123, s. 10.

⁵ 45 & 46 Vict. c. 78.

⁶ See 31 & 32 Vict. c. 123, ss. 9, 15; *Aberdeen Harbour Commrs. v. Stott*, 1927 S.C. (J.) 35; *Middleton v. Tough*, 1908; 1908 S.C. (J.) 33; 5 Adam 485; *Middleton v. Paterson*, 1904, 6 F. (J.) 27; 4 Adam 321; *Osborne v. Anderson*, 1887, 15 R. (J.) 12; 1 White 497; *Macrorie v. Forman*, 1905, 8 F. (J.) 23; 4 Adam 682.

⁷ 31 & 32 Vict. c. 123, ss. 9, 15, 41.

four feet in width from top to bottom shall be made, and kept free from obstruction in each and every pouch, trap, or chamber of the same. (2) The pouches, traps, or chambers of each and every fly net shall be either raised and tied up to the upper ropes of same, or lowered and tied to the lower ropes, so as effectually to prevent the capture or obstruction of salmon. (3) The netting of the leader of each and every bag net shall be entirely removed and taken out of the water. A contravention of these provisions is an offence. It is also an offence to take salmon during the weekly close time. Penalties are imposed upon any proprietor, or, where let, the occupier, of any fishery at which stake weir, or stake nets, fly nets, or bag nets are used, who fails to do all acts required by any by-law in force for the due observance of the weekly close time. During the weekly close time the hecks or rails of cruives must be removed and the inscales removed or kept open for the space of four feet.

312. The annual close time was the subject of very early legislation. In more recent times the Home Drummond Act ¹ fixed a uniform close time for the whole of Scotland, excepting the Tweed and Solway. This uniform system was departed from in 1862, when a close time appropriate to each district for all methods of fishing except rod fishing, and also for rod fishing, was substituted.² But the annual close time must run for 168 days; its incidence may be varied in each district.³

SUBSECTION (4).—*Offences.*

313. Any person who sells or exposes for sale, or has in his possession, any salmon taken within the limits of the Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, is liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon so bought, sold, or exposed for sale, or in his possession; and any such salmon so bought, sold, or exposed for sale, or in his possession, shall be forfeited; and the burden of proving that any such salmon was caught beyond the limits of the Act lies on the person selling or exposing the same for sale, or having the same in his possession.⁴ “Any district” includes the Tweed district.⁵

314. Any person who commits any of the following offences:—(1) Who fishes for, takes, or attempts to take, or aids or assists in fishing for, taking, or attempting to take, salmon during the annual close time by any means other than rod or line; (2) who fishes for, takes, or attempts to take, or aids or assists in fishing for, taking, or attempting to take, salmon (except during Saturday or Monday by rod and line) during the weekly close time, or contravenes in any way any by-law

¹ 9 Geo. IV. c. 39.

² *Ibid.*, s. 9.

³ 31 & 32 Vict. c. 123, Schedule C.

⁴ *Ibid.*, s. 21.

⁵ *Chalmers v. M'Glashan*, 1886, 13 R. (J.) 17; 1 White 1; *Wilsone v. Harvey*, 1884, 12 R. (J.) 12; 5 Coup. 518; *Stevenson v. M'Levy*, 1879, 6 R. (J.) 33; 4 Coup. 196.

in force regarding the observance thereof; (3) who fishes for or takes, or aids in fishing for or taking, salmon during the annual close time by means of rod and line, at a period not sanctioned by the by-laws in force in the district; (4) who fishes for, or aids in fishing for, salmon with a net having a mesh contrary to any by-law; (5) who sets or uses, or aids in setting or using, a net or any other engine for the capture of salmon when leaping at, or trying to ascend, any fall or other impediment, or when falling back after leaping; (6) who does any act for the purpose of preventing salmon from passing through any fish pass, or taking any salmon in its passage through the same; (7) who wilfully puts or causes to be put, or neglects to take reasonable precautions to prevent the discharge of, any sawdust, chaff, or any shelling of corn into any river; (8) who in any way contravenes any by-law, is liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon taken or killed in an illegal manner, and shall forfeit the salmon so taken; and in addition must pay the expenses of conviction.¹ As a further penalty an offender shall, at the discretion of the Court, forfeit every boat, net, rod, line, gaff, spear, leister, or other instrument used for fishing which is found in his possession at the time of committing the offence.² Any person having in his possession any salmon taken within the limits of the Act during the annual close time is liable to a penalty.³

315. Nets used for the capture of salmon must have meshes one inch and three-quarters in extension from knot to knot, measured on each side of the square, or seven inches measured round each mesh, when wet; and the placing of two or more nets behind or near to each other in such manner as to diminish the mesh of the nets used, or the covering of the nets used with canvas, or the using of any other artifice so as to evade the provisions of the regulations with respect to the meshes of nets is an offence.⁴ The use or possession of any light or fire, spear, leister, gaff, or otter for catching salmon, or any instrument for dragging for salmon, is prohibited, under a penalty not exceeding £5, with forfeiture of the instrument and any salmon so taken;⁵ but an exception is made in favour of any person "using a gaff as auxiliary to angling with a rod and line." The sale and use of salmon roe is forbidden.⁶ The prohibition does not apply to any person who uses, or has in his possession, salmon roe for artificial propagation or scientific purposes, or gives any reason satisfactory to the Court by which he is tried for having the same in his possession.⁷

316. The proprietor or occupier of any fishery must, within thirty-six hours after the commencement of the annual close time, remove

¹ 31 & 32 Vict. c. 123, s. 15.

² *Ibid.*, s. 31.

³ *Ibid.*, s. 21; see *M'Atlee v. Hogg*, 1903, 5 F. (J.) 67; 4 Adam 190.

⁴ 31 & 32 Vict. c. 123, Schedule E; *Mackenzie v. Pitcaithly*, 1887, 14 R. (J.) 19; 1 White 346; *Glen v. Colquhoun*, 1865, 5 Irv. 203.

⁵ 31 & 32 Vict. c. 123, s. 17.

⁶ *Ibid.*, s. 19.

⁷ *Crook v. Duncan*, 1899, 1 F. (J.) 50; 2 Adam 658.

and carry from such fishery, and from the landing-places and grounds adjacent thereto, all boats, oars, nets, engines, and other tackle used or employed by such proprietor or occupier in taking salmon, and effectually secure the same so as to prevent their being used in fishing until the end of the close time, with the exception of such boats and oars as may be used for angling. The proprietor or occupier of any cruive, also, must, within thirty-six hours after the commencement of the annual close time, remove and carry away all the hecks, rails, and inscales, and effectually secure the same so as to prevent their being used in fishing, and must also remove all planks and temporary fixtures and other obstructions to the free passage of fish through the cruive. Any proprietor or occupier who neglects to remove and carry away and effectually secure in manner aforesaid any boat, oar, net, engine, or other tackle, or any heck, rail, or inscale, or any obstruction to the passage of salmon through a cruive, shall forfeit every engine and thing not removed and carried away in obedience to the statutory requirements, and for every day during which he suffers any such engine or thing to remain unremoved beyond the period prescribed in the Act, he shall be liable to a penalty not exceeding £10.¹ These provisions do not, however, apply to any ferry boat, or prevent any proprietor of lands from continuing any boat for the use of himself, or of his family, if such boat shall have the name of the proprietor painted thereon, and be secured, when not in use for lawful purposes, by lock and key.²

317. Penalties for the pollution of salmon rivers were imposed by s. 13 of the 1862 Act, as amended by s. 16 of the 1868 Act. These sections are now superseded in practice by the Rivers Pollution Prevention Act, 1876.³

318. Every person who (1) wilfully takes or destroys any smolt or salmon fry; ⁴ (2) buys, sells, exposes for sale, or has in his possession any smolt or salmon fry; (3) places any device or engine for the purpose of obstructing their passage; (4) wilfully injures them; (5) wilfully injures or disturbs any salmon spawn; (6) wilfully disturbs any spawning bed or bank or shallow in which salmon spawn may be; or (7) wilfully impedes or obstructs the passage of salmon to any such bed, bank, or shallow, is liable to a maximum penalty of £5 for every such offence, with forfeiture of the implements used, and of the smolt or salmon fry found in his possession.⁵ Acts done for the purposes of artificial propagation or scientific research, or in the course of cleaning or repairing dams or mill lades, or in the exercise of rights of property in the bed of the river or stream, are excepted. A District Board may, with the consent of all the proprietors of salmon fisheries in any river or estuary, adopt such means as they think fit for preventing the ingress of salmon into narrow streams in which they or the salmon beds are, from the nature of the channel, liable to be destroyed, but always so that no

¹ 31 & 32 Vict. c. 123, s. 23.

² *Ibid.*, s. 24.

³ 39 & 40 Vict. c. 75.

⁴ *Macrorie v. Mackay*, 1909 S.C. (J.) 18; 5 Adam 660.

⁵ 31 & 32 Vict. c. 123, ss. 18, 19.

water rights used or enjoyed for the purposes of manufacture, agriculture, or drainage are interfered with.

319. Every person who wilfully takes, fishes for, or attempts to take, or aids or assists in taking, fishing for, or attempting to take, any unclean or unseasonable salmon, is liable to a penalty not exceeding £5 in respect of each such fish taken, sold, or exposed for sale, or in his possession, with forfeiture of the fish.¹ Any person who takes a fish accidentally and forthwith returns the same to the water with the least possible injury, or who takes or is in possession of a fish for artificial propagation or scientific purposes, is exempted from the penalties imposed. What is an unclean and unseasonable fish depends upon the evidence of fishermen or other skilled persons, but the term is generally held to mean a salmon which has spawned and not yet returned to the sea.

320. All salmon intended for exportation must be entered for that purpose with the proper officer of Customs at the place of exportation, and, if during the close time, the Commissioners of Customs must be satisfied that the fish have been legally captured, under penalty of forfeiture of the fish and a fine not exceeding £1 for each fish (s. 34).² Customs officers may open parcels, suspected to contain salmon, for inspection.

SUBSECTION (5).—*Powers of Fishery Officers, etc.*

321. Power is given to any water bailiff, constable, watcher, or officer of any District Board, or police officer, to search for salmon captured in contravention of the Act, and to enter and remain on lands for the purpose of the Act without being a trespasser.³ Any member of a District Board, or water bailiff, constable, watcher, or officer of the Board, or any police officer, is entitled to examine any dam, weir, cruive, or fixed engine within the limits of the district, or any artificial watercourse in that district; and any owner or occupier of any such dam, weir, cruive, or fixed engine, or artificial watercourse refusing access thereto to any such member of the Board, water bailiff, constable, or officer of the Board, or any police officer, shall be liable to a penalty not exceeding £5 for each offence. Any member of the Board, or water bailiff, constable, watcher, or officer of the Board, or any police officer, may search all boats, nets, baskets, or bags and other instruments used in fishing for salmon, or which he may have reason to expect contain salmon illegally taken, and he may seize all illegal nets, or nets being used illegally, and other instruments of fishing, and all fish and other articles liable to be forfeited under the provisions of this Act, and, generally, may act as a constable for the enforcement of the provisions of the Act, and when so acting shall be deemed to be a constable.⁴ Sec. 29 provides for the apprehension of offenders.

¹ 31 & 32 Vict. c. 123, s. 20.

² *Ibid.*, s. 22.

³ *Ibid.*, ss. 25, 26, 27.

⁴ *Ibid.*, s. 28; *Jackson v. Stevenson*, 24 R. (J.) 38; 2 Adam 255.

SUBSECTION (6).—*Prosecutions.*

322. Offences under the Act may be prosecuted, and all penalties incurred may be recovered, before any Sheriff or any two or more justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any District Board or of any other person; and it shall be lawful for the Sheriff or justices to proceed in a summary form . . . and on proof on oath by one or more credible witness or witnesses . . . determine and give judgment in any complaint presented to them.¹ A justice of the peace is not disqualified from trying any case under the Act by reason of his being a member of a District Board, but he cannot try any case for an offence committed on his own fishing.²

SECTION 3.—FIXED ENGINES FOR SALMON.

323. Fishing by net and coble is the only lawful mode of fishing for salmon with nets in rivers and estuaries.³ The net must not quit the hand of the fisherman and must be kept in motion during the operation of fishing.⁴ It follows that the use of fixed engines for taking salmon, with one exception, though permitted on the open coast, is forbidden in rivers and estuaries.⁵ All doubts as to the limits which divide each river in Scotland and its estuary from the sea have been set at rest by the 1862 Act,⁶ whereby the Commissioners under the Act were empowered to fix the boundary line between the estuary and the sea in every river in Scotland, including the Solway, but excluding the Tweed,⁷ the mouth of which was already defined in an earlier statute of 1859. Outwith the boundaries so defined any kind of fixed engine may be used, but the most common in use are stake nets, fly nets, and bag nets. Proprietors of sea fishings also use net and coble, and such use for the prescriptive periods sets up a good title as against the Crown to the salmon fishings.⁸ The following methods of fishing for salmon in rivers and estuaries are now declared to be illegal: Stake nets, fly nets, and bag nets;⁹ stent nets;¹⁰ hang nets and drift nets;¹¹ stoop nets;¹² sole

¹ 31 & 32 Vict. c. 123, s. 30.

² *Ibid.*, s. 34.

³ *Wedderburn v. Duke of Atholl*, 1900, 2 F. (H.L.) 57.

⁴ *Hay v. Mags. of Perth*, 1863, 4 Macq. 543; 1 M. (H.L.) 41.

⁵ *Earl of Kintore v. Forbes*, 1826, 4 S. 641; 1828, 3 W. & S. 261.

⁶ 25 & 26 Vict. c. 97, s. 6.

⁷ See 22 & 23 Vict. c. 70.

⁸ *M'Douall v. Lord Advocate*, 1873, 11 M. 688; *revd.* 1875, 2 R. (H.L.) 49.

⁹ *Earl of Kinnoul v. Hunter*, 1802, Mor. 14301; 1804, 4 Pat. 561; *Dalglish v. Duke of Atholl*, 1812, 7th March 1812, F.C.; 1816, 5 Dow 282; *Duke of Atholl v. Wedderburn*, 1826, 5 S. 153; *Carnegie v. Ross's Trs.*, 1829, 7 S. 284; *Colquhoun v. Duke of Montrose*, 1804, Mor. 14283; 1801, 4 Pat. 221; *Mags. of Dunfermline*, 1816, 6 Pat. 163; *Mackenzie v. Renton*, 1840, 2 D. 1078; *Allan's Mortification v. Thomson*, 1879, 7 R. 221; *Earl of Wemyss v. Zetland*, 1890, 18 R. 126.

¹⁰ *Coble Fishers of Don*, 1693, Mor. 14287; *Mackenzie v. Houston*, 1830, 8 S. 796; *Queensberry v. Annandale*, 1871, Mor. 14279; *Dirom v. Littles*, 1796, Mor. 14282.

¹¹ *Duke of Atholl v. Glover Incorporation of Perth*, 1900, 2 F. (H.L.) 57.

¹² *Erskine v. Mags. of Stirling*, 1763, Mor. 14268; *affd.* 1765, 6 Pat. 774; *Grant v. M'William*, 1846, 10 D. 666 n.; *Maxwell v. Lamont*, 1903, 6 F. 245, at p. 254.

or pock nets;¹ cairn nets;² and tout-and-haul nets.³ The names applied to the various forms of fixed engines often vary in different localities, but, generally, the type of net used will fall under one or other of these methods.⁴ Zaires or yairs—enclosures, the walls of which were made of stone, wood, or wickerwork—are no longer in use in fresh waters, and their use in tidal waters is illegal.⁵ The right to fish for white fish by means of zaires is still permitted.⁶

SECTION 4.—CRUIVES.

324. Cruives are now the only fixed engines which can be lawfully used for salmon fishing in rivers. They are only permissible, however, in that part of a river which is above the highest point at which the ebb and flow of the tide is perceptible. The following is a description of a cruive. "A strong wall is built across the river, called the cruive-dyke. The side which fronts the stream is nearly perpendicular, the lower side is built with an easy slope. In the wall, certain openings or gaps are left in which are placed the engines for catching the fish, called the cruive-boxes, and which are so constructed as to serve the purpose of catching fish of proper size, but also of suffering small fish and fry to pass through. For this purpose the two ends of the cruive-boxes are made with hecks or racks of a certain wideness, and the hecks at the upper end, which receive the stream, are all immoveable, except so many of them as are made to draw out by making an opening of an ell wide, which is done from sunset Saturday till sunrise Monday, called Saturday sloop. The racks or hecks at the lower end are like two folding doors placed angularly towards each other and sloping into the cruive-box, where they are sharpened at the points, and stand three inches asunder. These are so constructed as to yield on the smallest pressure, in order to let into the cruive the largest fish ascending the river, but prevent them from getting back by the sharpness of the points, and being shut by the force of the stream. These lowest hecks are called the inscales."⁷

325. The use of cruives is a destructive method of fishing, and the few that remain will, in all probability, be demolished. The right to use cruives could only be expressly granted by the Crown.⁸ It could not be conferred by a general grant of salmon fishings, though it could be established by possession for the prescriptive period on a Crown grant

¹ *Gray v. Sime*, 1838, 13 S. 1089; *Haig v. Bremner*, 1903, 5 F. (J.) 98; 4 Adam 251.

² *Copland v. Maxwell*, 1810, 13th June, F.C.; *Forbes v. Smyth*, 1825, 1 W. & S. 583.

³ *Wedderburn v. Duke of Atholl*, 1900, 2 F. (H.L.) 57.

⁴ For a description of these fixed engines, see Tait, *Game and Fishing Laws*, 2nd ed., p. 164 *et seq.*

⁵ *Mackenzie v. Renton*, 1840, 2 D. 1078.

⁶ *Fraser v. Duff*, 1829, 8 S. 14.

⁷ *Halkerton v. Scott*, 1769, Mor. 14276 (House of Lords Appeal Papers, 1772).

⁸ *Stair*, ii. 3, 70; *Ersk.* ii. 6, 15; *Bell's Prin.*, s. 1118.

with a general clause of "fishing," or a clause of salmon fishings.¹ Having once granted the right of salmon fishings to one person, the Crown cannot grant the right of cruive fishing in the same waters to another.²

326. There are many old Scots Acts and decisions dealing with the construction and use of cruives, but these need not be referred to. The Commissioners appointed under the Salmon Fisheries Act, 1862,³ now regulate the construction and use of cruives by a series of by-laws which they issued in 1865, and which are still in force.⁴ The by-laws contain detailed directions as to the construction of cruives, size of gaps (minimum 4 feet), intervals between hecks (3 inches), and between inscales (2 inches). The heck and inscales must be removed during the annual close time, and during the weekly close time the heck must be removed and the inscales either removed or kept open for a space of 4 feet. To construct a cruive in such a way that it could not be properly examined by duly authorised inspectors was forbidden. Nor is any alteration of a cruive so as to create a greater obstruction to the free passage of fish permitted. While canvas cloths or wooden blinds may be put over the heck when removing fish from the cruive, throwing nets over it for the purpose of catching fish or preventing their passage is forbidden.⁵

SECTION 5.—DYKES AND WEIRS.

327. Mill-dam dykes or weirs, although not fixed engines for catching salmon, may seriously obstruct the passage of salmon, and are subject to regulation. The Scots Act 1696, c. 33, which appears to have been the first enactment dealing with them, is now practically superseded by by-laws made by the Commissioners under the Salmon Fisheries (Scotland) Act, 1862.⁶ The by-laws make provision for ensuring that mill dams shall be kept watertight as far as possible, and that the flow of water over the dam shall be kept as full as possible by the provision of sluices at the intakes of lades. Gratings are to be placed at the intake of the lade, immediately above the mill wheel, and across the lower end of the tail lade. Salmon ladders are to be placed in the downstream face of the dam to enable salmon to pass upstream.

SECTION 6.—ILLEGAL METHODS OF TAKING SALMON.

328. The taking of salmon by means of a small-mesh net, *i.e.* a net the meshes of which are under $1\frac{3}{4}$ inches in extension from knot to knot, or 7 inches measured round each mesh when wet, is forbidden.⁷ It is also a contravention of the by-law to place two or more nets behind or

¹ *Heritors of Don v. Aberdeen*, 1665, Mor. 10840; *Johnston v. Stotts*, 1802, 4 Pat. 274; *Lord Advocate v. Lord Lovat*, 1880, 7 R. (H.L.) 122; *Mags. of Inverness v. Duff*, 1775, Mor. 14257; *Grant v. Duke of Gordon*, 1778, Mor. 14297; 1776, 3 Pat. 679; see also *Forbes v. Earl of Kintore*, 1826, 4 S. 650 (N.E. 656).

² *Duke of Argyll v. Campbell*, 1891, 18 R. 1094.

³ 25 & 26 Vict. c. 97, s. 6 (6).

⁴ 31 & 32 Vict. c. 123, s. 10 and Schedule F.

⁵ 31 & 32 Vict. c. 123, Schedule F.

⁶ *Ibid.*, Schedule G. ⁷ *Ibid.*, Schedule E.

near each other, so as to diminish the mesh. The penalty for an offence under the by-law is a fine not exceeding £5, £2 for each salmon caught, and costs. Forfeiture of the fish is also provided for.

329. To take salmon by means of the “cleek and lantern,” *i.e.* using a light and spear, leister, gaff, or other like implement, is illegal.¹ The offence involves a maximum penalty of £5, and forfeiture of the fish and instrument. The use of a gaff when rod fishing is not illegal.

330. The use of salmon roe for the purpose of fishing is forbidden.² The use of dynamite or other explosive to catch fish in any river, water, or loch in Scotland is also forbidden,³ and is punishable by a maximum fine of £20, or two months’ imprisonment with or without hard labour.⁴

SECTION 7.—POACHING OF SALMON.

SUBSECTION (1).—*Day Poaching.*

331. Poaching or the taking of salmon or other fish of the salmon kind, without having a legal right or permission from one having a legal right, is made an offence by the Salmon Fisheries (Scotland) Act, 1828,⁵ as amended by the Salmon Fisheries (Scotland) Act, 1844.⁶ These Acts do not apply to the Tweed or the Solway.⁷ The 1828 Act enacted (s. 3), that “if any person shall trespass in any ground, inclosed or uninclosed, or in or upon any river, stream, watercourse, or estuary, with intent to kill salmon, grilse, sea trout, or other fish of the salmon kind, such person shall forfeit and pay any sum not less than ten shillings, and not exceeding five pounds.”

332. A more elaborate definition of the offence is given by s. 1 of the 1844 Act, which provides: “If any person, not having a legal right or permission from the proprietor of the salmon fishery, shall wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, firth, sea loch, creek, bay, or shore of the sea, or in or upon any part of the sea, within one mile of low-water mark in Scotland, any salmon, grilse, sea trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than ten shillings and not exceeding five pounds for each and every such offence, and shall, if the Sheriff or justices shall think proper, over and above forfeit each and every fish so taken, and each and every boat, boat-tackle, net, or other engine used in taking, fishing for, or attempting to take fish as aforesaid; and it shall be lawful for any person employed in the execution of this Act to seize and detain all fish so taken, and all boats, tackle, nets, and other engines so used, and to give information thereof to the Sheriff or any justice of the peace, and any such Sheriff or justice may give such orders concerning the immediate disposal of the same as may be

¹ 31 & 32 Vict. c. 123, s. 17.

² *Ibid.*, s. 18.

³ 2 Edw. VII. c. 29, s. 3.

⁴ 40 & 41 Vict. c. 65.

⁵ 9 Geo. IV. c. 39.

⁶ 7 & 8 Vict. c. 95.

⁷ 9 Geo. IV. c. 39, s. 14.

necessary.”¹ Prosecution must follow within six months after the offence,² and may be at the instance of an individual member of the public.³ Imprisonment may follow non-payment of the penalty.⁴

SUBSECTION (2).—*Night Poaching.*

333. Night poaching is made a criminal offence by s. 27 of the Act 1862.⁵ “If three or more persons, acting in concert, or being together or in company, shall at any time between the expiration of the first hour after sunset on any day and the beginning of the last hour before sunrise on the following morning,⁶ enter or be found upon any ground adjacent or near to any river or estuary of the sea, with intent illegally to take or kill salmon, or having in his or their possession any net, rod, spear, light, or other instrument used for taking salmon with such intent as aforesaid, or shall illegally take or kill, or attempt to take or kill, or aid or assist in killing or taking salmon, every such person shall be guilty in Scotland of a criminal offence, and in England, within the limits of the Tweed Fisheries Amendment Act, of a misdemeanour, and shall, for every such offence, be liable to a fine not exceeding five pounds, or to imprisonment for any period not exceeding three months, as the Sheriff or justices before whom such persons, or any of them, are tried and convicted, may determine; and if such fine be not immediately paid on conviction, the offender so failing to pay shall be sentenced to imprisonment for such period, not exceeding three months, as the Sheriff or justices may adjudge, unless such fine shall be sooner paid.” The section applies both to the Tweed and to the Solway.⁷ “Public right” is not a defence to the charge of poaching for salmon.⁸

SECTION 8.—DISTRICT BOARDS.

334. The division of all the salmon fisheries in Scotland and the adjoining seas into districts was one of the duties imposed on the Commissioners in the Act of 1862. Each district is controlled by a District Board elected by the proprietors of the salmon fishings in the district. The normal size of the Board is seven members—three elected by the upper proprietors, three by the lower proprietors, and the proprietor entered in the Valuation Roll as the largest fishery proprietor, who is chairman of the Board, with a deliberative as well as a casting vote. The Commissioners had also to fix a point in each river dividing the upper proprietors from the lower proprietors.

¹ See *Anderson v. Anderson*, 1867, 5 Irv. 499; *Grant v. Wright*, 1876, 3 R. (J.) 28; 3 Coup. 282; *O'Neill v. Campbell*, 1883, 10 R. (J.) 76; 5 Coup. 305; *Macintosh v. Gordon*, 1829, 1 Deas & And. 183; *Lord Lovat v. Munro*, 1886, 1 White 119; *Easton v. List*, 1844, 2 Broun 95.

² 9 Geo. IV. c. 39, s. 13.

³ 1844 Act, s. 2; 1828 Act, s. 9; *Munro v. Buchanan*, 1910 S.C. (J.) 47; 6 Adam 234.

⁴ *Lawson v. Jopp*, 1853, 15 D. 392.

⁵ 25 & 26 Vict. c. 97.

⁶ *Mackinnon v. Nicolson*, 1916 S.C. (J.) 6; 7 Adam 713 (local, not “Greenwich” time).

⁷ 25 & 26 Vict. c. 97, ss. 33, 34.

⁸ *Anderson v. Anderson*, *supra*.

335. The qualification for voting is a fishing entered in the Valuation Roll as of the yearly value of £20 or upwards, or, in the case of upper proprietors only, if not on the Valuation Roll, of half a mile of frontage to the river with a right of salmon fishing. A proprietor of a fishing valued at more than £500 in the Valuation Roll has two votes at an election of the Board, and an additional vote for every £500 of rental, but not more than four votes in all.¹ Each District Board remains in office for a period of three years, each member being eligible for re-election. The election takes place at meetings of the upper and lower proprietors summoned by the clerk. Mandatories may be appointed in writing by proprietors,² or by members of the District Board,³ and they may attend, act, and vote at any meeting of proprietors or a District Board.⁴ Vacancies on the District Board may be filled by the Board. Three members form a quorum if there are more than six members, and two if there are less than six. When a District Board has lapsed, the Court of Session will, on petition, remit to the Sheriff to proceed in accordance with the methods of constituting the original Boards.⁵

336. A District Board may appoint a clerk, constables, water bailiffs, watchers, and other officers, and may combine with any other District Board for the purpose of the Acts,⁶ and maintain a common staff of officers. The duties of a District Board are (1) to enforce the laws against poaching salmon; (2) to enforce the by-laws and regulations of the Commissioners; (3) to prosecute in other statutory offences and contraventions of by-laws, and recover penalties;⁷ and (4) to acquire, by agreement, and for demolition only, dams, weirs, cruives, or other fixed engines, and to do all necessary acts for the protection and improvement of the fisheries within the district. For these purposes they may impose a fishery assessment,⁸ and borrow on the security of that assessment.⁸

337. A District Board may petition the Secretary of State for Scotland:

1. To vary the annual close time in the district;
2. To vary the weekly close time in the district, or in different parts of the district;
3. To alter the regulations with respect to the observance of the annual or weekly close time for the district; and
4. To alter the regulations with respect to the construction and use of cruives and cruive dykes or weirs within the district.⁹

A District Board may sue and be sued in name of the clerk, but their title to sue is limited to their statutory powers.¹⁰

¹ 25 & 26 Vict. c. 97, s. 18.

² *Ibid.*, s. 20.

³ 31 & 32 Vict. c. 123, s. 8.

⁴ *Ibid.*, ss. 18, 19, 20.

⁵ *Campbells, Petrs.*, 1883, 10 R. 819; *Duke of Argyll, Petr.*, 1896, 23 R. 991.

⁶ 25 & 26 Vict. c. 97, s. 22.

⁷ 31 & 32 Vict. c. 123, s. 20; *Blair v. Lumsden & Sanderson*, 1869, 7 M. 1126; 1 Coup. 309.

⁸ 31 & 32 Vict. c. 123, s. 14.

⁹ *Ibid.*, s. 90.

¹⁰ *Tay District Board v. Robertson*, 1887, 15 R. 40.

SECTION 9.—THE TWEED.

SUBSECTION (1).—*Statutes.*

338. The Tweed is the subject of special legislation. The Acts which regulate the salmon fishings in “the river” are as follows:—

1. The Tweed Fisheries Act, 1857.¹
2. The Tweed Fisheries Amendment Act, 1859.²
3. The Salmon Fisheries (Scotland) Act, 1862,³ ss. 10, 27, and 34.
4. The Salmon Fisheries (Scotland) Act, 1863,⁴ s. 4.
5. The Salmon Fisheries (Scotland) Act, 1868,⁵ ss. 13, 18, 20, 33, and 41, and Schedule A (Tweed).

The expression “the river” means the River Tweed, and every river, brook, or stream which flows or runs into it, and also the mouth or entrance of the river.⁶ “Salmon” is defined as including salmon, grilse, sea trout, whitling, and other fish of the salmon kind.

SUBSECTION (2).—*River Tweed Commissioners.*

339. The salmon fishings in “the river” are regulated by a board called the River Tweed Commissioners, composed of all proprietors of fishings of the annual value of £30, or fishings of half a mile in length on one side of the river only, or a quarter of a mile on both sides, and representatives from certain public bodies.⁷ No distinction is made between upper and lower river proprietors. Any Commissioner accepting an office under the Tweed Acts becomes disqualified from acting as such.⁸

340. The Commissioners are empowered to appoint a chairman, clerk, treasurer, superintendent of the water bailiffs, and other officers at such remuneration as they deem proper.⁹ The superintendent and water bailiffs, after being sworn into office, have and are entitled to exercise the powers and authority of constables in all matters connected with the Acts in the same manner as if offences were breaches of the peace.¹⁰ They can apprehend and detain, without any warrant other than the Act, persons caught contravening the provisions of the Acts; in other cases the warrant of a magistrate is required.¹¹

341. The Commissioners may sue and be sued in name of three of their number or of their clerk.¹² They have power to order distinguishing marks to be painted on boats used for fishing with nets;¹³ to remove and destroy fixed engines;¹⁴ to enforce regulations with respect to mill-dams and cauld;¹⁵ and to remove obstructions in the river.¹⁶ They

¹ 20 & 21 Vict. c. 148.² 22 & 23 Vict. c. 70.³ 25 & 26 Vict. c. 97.⁴ 26 & 27 Vict. c. 50.⁵ 30 & 31 Vict. c. 123.⁶ 20 & 21 Vict. c. 148, s. 2; see also 22 & 23 Vict. c. 70, s. 4.⁷ 20 & 21 Vict. c. 148, s. 10. ⁸ *Ibid.*, s. 16. ⁹ *Ibid.*, s. 24. ¹⁰ *Ibid.*, s. 27.¹¹ *Ibid.*, ss. 38, 51; *Mauchline v. Stevenson*, 1878, 5 R. (J.) 21; 4 Coup. 20; *Jackson v. Stevenson*, 1897, 24 R. (J.) 38; 2 Adam 255.¹² 20 & 21 Vict. c. 148, s. 35.¹³ *Ibid.*, s. 54.¹⁴ *Ibid.*, s. 55.¹⁵ *Ibid.*, s. 56.¹⁶ *Ibid.*, ss. 57, 58.

can acquire for the purpose of removal any dam, weir, cruives, or other fixed engines, and do all necessary acts for the protection and improvement of the fisheries.¹ For defraying the expenses incurred in carrying the Acts into effect, the Commissioners have power to impose and levy an annual rate not exceeding 20 per cent. per annum on the whole owners of salmon fisheries in the river, in proportion to their rents or yearly value of their several fisheries.² The valuation of the fisheries is fixed by the Commissioners, or on appeal by the Sheriff or justices.

SUBSECTION (3).—*Close Times.*

342. The annual and weekly close times applicable to the river are regulated by the 1859 Act. The annual close time for nets, and for rod fishing with any other lure than the artificial fly, extends from 14th September to 15th February following. For rod fishing with the artificial fly the period extends from 30th November to 1st February following.³ The use of the artificial fly as a rake hook is not allowed. Salmon may be removed from the river during the close season for scientific breeding purposes, and the removal of dead salmon from the river in the close time is not an offence.⁴ The weekly close time extends from six o'clock on Saturday afternoon to six o'clock on Monday morning. For stake and bag nets the close time applies from low water before six o'clock on Saturday night to low water before six o'clock on Monday⁵ morning. Failure to comply with the strict observance of the close-time regulations for stake and bag nets will not be penalised if due to storm or stress of weather.⁶ There is no weekly close time for rod fishing. In England, Sunday rod fishing on the Tweed is not prohibited. Whether it is permissible in Scotland has not been determined. Contraventions of the regulations governing close times in the Tweed are subject to a maximum penalty of £10, with an additional penalty of 10s. for each salmon taken, and forfeiture of the fish, boat, and all tackle used.⁷ The taking of a foul or unclean salmon during legitimate fishing operations with nets is an offence rendering the person so taking liable to a fine of 10s. for each salmon.⁸

SUBSECTION (4).—*Fixed Nets and Fixed Engines.*

343. Fixed nets and fixed engines are prohibited within the limits of the river and its mouth as defined in the 1857 Act under a penalty not exceeding £20, with a daily penalty not exceeding £10 for each day such fixed net or fixed engine is used, and a further penalty of 10s. for each salmon taken, with forfeiture of the fish, net, and other tackle.

¹ 31 & 32 Vict. c. 123, ss. 13, 41.

² 20 & 21 Vict. c. 148, s. 79; 22 & 23 Vict. c. 70, s. 5.

³ 22 & 23 Vict. c. 70, s. 6; *Whillans v. Stevenson*, 1902, 5 F. (J.) 11; 4 Adam 64; *Rodger v. Hislop*, 1879, 6 R. (J.) 16; 4 Coup. 210.

⁴ *Bathgate v. M'Arthur*, 1873, 2 Coup. 420.

⁵ *Ibid.*, s. 12.

⁷ *Ibid.*, s. 8.

⁵ 22 & 23 Vict. c. 70, s. 7.

⁸ *Ibid.*, s. 17.

Stake and bag nets must only be used beyond the limits of the mouth of the river as laid down in the 1857 Act, and in accordance with certain regulations.¹ The terms "fixed net" and "fixed engine" are defined in the 1857 Act.² The prohibition against fixed engines does not apply to waterwheels placed in mill lades.³ A heck must be placed in front of such waterwheels, with vertical bars of not more than $3\frac{1}{4}$ inches between each bar, extending for the full depth and breadth of the mill lade.⁴

SUBSECTION (5).—*Mill Dams, Dykes, and Weirs.*

344. All mill dams, dykes, weirs, caulds, and other permanent obstructions are to be constructed, and if necessary altered, to permit the free run of salmon over the same in the main stream of the river in the ordinary and mean state thereof. If the owners or occupiers of such mill dams, etc., refuse or neglect to construct or alter the same after being called upon, the Sheriff or justices may order such construction or alteration to be done at the expense of the Commissioners in the case of the permanent obstruction existing at the passing of the 1857 Act (17th August 1857), and at the expense of the owner or occupier if it has been erected subsequent to the passing of the Act. The height of mill dams, etc., existing at the passing of the Act is not to be altered.⁵ The Commissioners have the same power as is given to District Boards under the 1868 Act to purchase by agreement any mill dam, etc., for the purposes of removal. Rocks, shoals, deposits of gravel, and all natural obstructions in the river which prevent the free passage of salmon are to be removed by the owner of the land or fishery where such obstructions are situated.⁶ Cairns are illegal, and must be removed by the proprietor.⁷ Noxious matters are not to be allowed to run into the river, and rubbish must not be thrown into the river at or below high-water mark.⁸

SUBSECTION (6).—*Removal of Boats, Nets, etc.*

345. Before 17th September in each year every occupier of a fishery must remove from the fishery and the houses and premises occupied by him all boats, oars, nets, engines, and other tackle used by him (except such boats, with their oars and other implements, as are used for angling or rod fishing), and lodge them securely until 13th February following. Boats used for angling or rod fishing must be removed by 3rd December and stored until 30th January.⁹ Public ferry boats, and boats used by the owner and occupier of land adjoining the river solely for transport of himself and dependants, and which conform to certain prescribed regulations, are excepted. These regulations provide that no ferry boat is to be used for fishing. All ferry boats and boats used

¹ 22 & 23 Vict. c. 70, ss. 5, 12, 13.

³ *Ibid.*, s. 61.

⁷ *Ibid.*, s. 58.

⁴ *Ibid.*, s. 59.

⁸ *Ibid.*, ss. 65, 66.

² 20 & 21 Vict. c. 148, s. 3.

⁵ *Ibid.*, s. 56.

⁶ *Ibid.*, s. 57.

⁹ 22 & 23 Vict. c. 70, s. 11.

for any purpose by owners and occupiers of any fishery within or of any land adjoining the river must bear the owner's full name and the number of the boat.¹

SUBSECTION (7).—*Illegal Methods of Fishing for Salmon.*

346. Certain methods of taking fish from the Tweed are illegal. "Beating the water," *i.e.* using any white object or net or other means to prevent salmon going up or down the river, is prohibited.² Leisters, spears, and similar implements are forbidden,³ and their possession within five miles of the river is an offence.⁴ Pout nets, rake hooks, or any similar engine for taking salmon, or their possession within five miles of the river, are prohibited.⁵ A "cleek" or any other instrument than a net may not be used when rod fishing between 15th September and 1st May.⁶ The possession or use of salmon roe, except for artificial propagation, is an offence in the Tweed as in other rivers.⁷

SUBSECTION (8).—*Other Offences.*

347. It is illegal for any person during the annual close time to fish for or take, or aid or assist in fishing for or taking, any salmon from the river between 14th September and 15th February following, except by rod and line with artificial fly only, or with rod and line at any time between 30th November and 1st February following.⁸ A similar prohibition applies to the weekly close times between 15th February and 14th September. The possession, sale, or exposure for sale of salmon during the annual close time is illegal.⁹ Any person not entitled to fish for salmon in the river, who at any time between 1st February and 30th November fishes for or takes, or assists in fishing for or taking in or from the river, any salmon commits an offence punishable by a fine not exceeding £10, with an additional 10s. for each salmon taken, and forfeiture of fish and all gear.¹⁰ Night poaching and illegal fishing in combination are made illegal in the Tweed by the 1862 Act.¹¹ Except by rod and line it is illegal to take, sell, purchase, or have in possession any smolt, fry, or young brood of salmon. Between 1st April and 1st June the killing or being in possession of smolts, etc., by rod and line is prohibited.¹²

¹ 22 & 23 Vict. c. 70, s. 11; see also 20 & 21 Vict. c. 148, ss. 48–54.

² 20 & 21 Vict. c. 148, s. 60.

³ *Ibid.*, s. 63.

⁴ *Ibid.*, s. 64.

⁵ 22 & 23 Vict. c. 70, s. 14; *Rodger v. Hislop*, 1879, 4 Coup. 210; *Gladstone v. Stevenson*, 1902, 3 F. (J.) 66; 3 Adam 628.

⁶ 22 & 23 Vict. c. 70, s. 16.

⁷ 1868 Act, s. 18; *Mauchline v. Stevenson*, 1878, 5 R. (J.) 21; 4 Coup. 20.

⁸ 22 & 23 Vict. c. 70, s. 6; *Bathgate v. M'Arthur*, 1873, 2 Coup. 420; *Rodger v. Hislop*, 1879, 6 R. (J.) 16; 4 Coup. 210; *O'Neill v. Campbell*, 1883, 10 R. (J.) 76; 5 Coup. 305; *Walker v. Rodger*, 1885, 12 R. (J.) 32; 5 Coup. 595.

⁹ 22 & 23 Vict. c. 70, s. 7; *Johnston v. Robson*, 1868, 1 Coup. 41; *Tough v. Jopp*, 1863, 4 Irv. 366; *Greig v. Jopp*, 1863, 4 Irv. 369; *Custar v. Chalmers*, 1878, 5 R. (J.) 36; 4 Coup. 46; *Osborne v. Anderson*, 1887, 15 R. (J.) 12; 1 White 497; *Middleton v. Tough*, 1908 S.C. (J.) 32; 5 Adam 485.

¹⁰ 22 & 23 Vict. c. 70, s. 15.

¹¹ 25 & 26 Vict. c. 97, ss. 27, 34.

¹² 20 & 21 Vict. c. 148, ss. 74, 75.

SECTION 10.—THE SOLWAY.

SUBSECTION (1).—*Statutory Provision.*

348. The Solway is, like the Tweed, the subject of special legislation, and along with its tributaries, with certain exceptions, is the subject of regulation by the Solway Fisheries Act, 1804.¹ Under this Act² “the Solway was defined as all the sea lying to the east of a line drawn from the hotel in Skinburness in Cumberland, northwards to the large house at Carsethorn of Arbigland in Kirkcudbright, and westwards from that line along the north shore to the Mull of Galloway for a breadth of two miles from high-water mark pointing southwards, and along the southern shore for a breadth of two miles from high-water mark pointing northwards to Hodbarrow Point in Cumberland.”³ In 1841 the Annan was withdrawn from the regulations enforced by the Solway Act,⁴ and in 1865⁵ the Dumfriesshire Esk was brought within the limit of the English Salmon Fishery Laws, although offences committed within Scottish jurisdiction are to be prosecuted and punished as directed by the Salmon Fisheries (Scotland) Act, 1865.⁶ The Solway Act now only applies to the Solway Firth north of its *medium filum*, and to the rivers, other than the Annan, which flow into it on the Scottish coast.

349. The general salmon fishery statutes, the Salmon Fisheries (Scotland) Acts, 1862 and 1868, with the exception of s. 25 of the later Act, apply to the Solway, and although they do not expressly repeal the Solway Act, 1804, practically supersede it. For example, the Commissioners under the 1862 Act fixed the limits dividing the Solway from the sea,⁷ and also the limits of the Firth itself, and determined the close time for both net and rod fishing.

SUBSECTION (2).—*Fixed Engines.*

350. Fixed engines in the Solway were declared illegal by the 1862 Act,⁸ unless lawfully exercised in 1861 or the four preceding years by virtue of any grant, or charter, or immemorial usage.⁹ In 1877 the Solway Salmon Fisheries Commissioners (Scotland) Act¹⁰ was passed, under which the Special Commissioners for Solway Fisheries were directed to inquire into the legality of all fixed engines erected or used for the taking of salmon in the waters and on the shore of the Solway Firth, as the same had been fixed under the authority of the Salmon Fisheries (Scotland) Act, 1862, and in the rivers flowing into the same,

¹ 44 Geo. III. c. 45.

² *Ibid.*, s. 28.

³ Tait, on Game and Fishing Laws, 2nd ed., p. 222.

⁴ 4 Vict. c. 18; *Bryson v. Phyn*, 1901, 3 F. (J.) 94; 3 Adam 215.

⁵ 28 & 29 Vict. c. 121.

⁶ See 13 & 14 Geo. V. c. 16, s. 23.

⁷ 25 & 26 Vict. c. 92, s. 6 (1) (2).

⁸ *Ibid.*, s. 33; cf. 24 & 25 Vict. c. 109, s. 11.

⁹ *Phyn v. Kenyon*, 1905, 7 F. (J.) 47; 4 Adam 528; *Marshall v. Phyn*, 1900, 3 F. (J.) 21; 3 Adam 262.

¹⁰ 40 & 41 Vict. c. 240.

and to remove all such as were not proved to be privileged.¹ A privileged fixed engine was defined to include only those which were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, 1864, in pursuance of any grant, or charter, or immemorial usage.² Certificates of "privileged engines" were granted by the Commissioners after inquiry, and a list was published of all fixed engines sanctioned by the Commissioners.

SUBSECTION (3).—*Paidle Nets.*

351. One of the chief difficulties with which the Commissioners had to deal was in regard to paidle nets. In *Gilbertson v. Mackenzie*³ it had been found that there was a public right to fish for white fish, including flounders, and all other kinds of fish except salmon and fish of the salmon kind, in the sea and along the shore of the Solway Firth, and that by means of stake or other nets or engines fixed on the shore, in such places and of such description as not to interfere with Mr. Mackenzie's right of salmon fishing, under reservation of the right of either party to take such legal proceedings, the one against the other, as might be competent to prevent all undue or improper encroachment on, or interference with, his or their respective right of fishing. The fishermen using these nets admitted that they had no right to fish for salmon, and they claimed no certificate of privilege; and the Commissioners, after hearing evidence, found that they were used for the taking of salmon, and ordered the removal of such of them as they had seen at Annan (Memorandum of Commissioners). This deliverance was appealed against in the case of *Coulthart v. Mackenzie*,⁴ but the deliverance of the Commissioners was upheld. In *Mackenzie v. Murray*⁵ Mr. Mackenzie, the defender in the two former cases, sought interdict against certain white fishers erecting or continuing to use stake or paidle nets similar to those referred to in the former cases, during the open salmon season within the limits of his fishings. After a proof and remits to a man of skill, interdict was granted as regards certain specified places, and decree for the removal of nets erected thereon. A similar interdict, but extending both to the salmon fishing season and the close time, was granted in *Duke of Buccleuch v. Kean*.⁶ Other engines, such as "half nets," "poke nets," and "raise nets," have also given rise to controversy. It must always be a question of proof whether, in any particular instance, they are used for the purpose of taking salmon or impeding the run of salmon.

SUBSECTION (4).—*The Annan.*

352. Although the Annan was made the subject of a special Act in 1841,⁷ the salmon fishings in that river are now regulated by the general

¹ 40 & 41 Vict. c. 240, s. 3.

² *Ibid.*, s. 4.

³ 1878, 5 R. 610.

⁴ 1879, 6 R. 1322.

⁵ 1881, 9 R. 186.

⁶ 1890, 17 R. 829.

⁷ Annan Fisheries Act, 1841 (4 Vict. c. 18).

Salmon Fisheries (Scotland) Acts, like other tributaries of the Solway. In the matter of fixed engines the Annan is subject to the English Salmon Fishery Act, 1861.¹

SECTION 11.—TROUT FISHING.

SUBSECTION (1).—*Title to Fish for Trout.*

353. The right of fishing for trout in a private stream or loch is a part and pertinent of the land, and belongs exclusively to the proprietor of the soil contiguous to the water in which the fish live. It requires no express grant or prescriptive possession.² The right may, however, be reserved or given out expressly to one who is not proprietor of the lands, and may pass by prescription on a general title.³ The proprietor of the right of fishing or his grantee has no property in the uncaught fish, for the trout themselves are the property of no person until they have been caught.⁴ The right to fish being the privilege of the proprietor of the lands, it follows that a mere right of access to a private stream or loch does not confer the right of fishing for trout.⁵

354. The right to trout fishing must be connected with some heritable subject; it cannot be held independently by one who has no property either in the stream or loch or in the adjoining lands, and a written title to the adjacent lands is necessary.⁶ The public, therefore, cannot prescribe a right of trout fishing against a proprietor of a river or loch.⁷ Lawful use of the banks of a river or shores of a loch does not entitle any person to fish in the river or loch. Still less has any person a right to trespass on the lands of another for the purpose of fishing.⁸ The public, though entitled to use a navigable river, have no right of fishing for trout therein if it be non-tidal.⁹ In order to give the public right to fish in a navigable river, it must also be tidal, and the tide must ebb and flow at the place where the right is claimed.¹⁰ In such a case the right extends up the river to the limit of the ordinary spring tides.¹¹ An agricultural tenant is not entitled to fish, even in water situated wholly on the farm, unless permission is granted in his lease.¹²

¹ 24 & 25 Vict. c. 109.

² *Carmichael v. Colquhoun*, 1787, Mor. 9645; *Mackenzie v. Rose*, 1832, 6 W. & S. 31; *Macdonald v. Farquharson*, 1836, 15 S. 259; *Cunninghame v. Dunlop*, 1838, 16 S. 1080; *Stewart's Trs. v. Robertson*, 1874, 1 R. 334.

³ *Macdonald v. Farquharson*, *supra*; *Scott v. Lord Napier*, 1869, 7 M. (H.L.) 35.

⁴ *Stair*, ii. 1, 5.

⁵ *Ferguson v. Shirreff*, 1844, 6 D. 1363; *Montgomery v. Watson*, 1861, 23 D. 635.

⁶ *Menzies v. Macdonald*, 1854, 16 D. 827; *Patrick v. Napier*, 1867, 5 M. 683; *Earl of Galloway v. Duke of Bedford*, 1902, 4 F. 857.

⁷ *Montgomery v. Watson*, *supra*; *Arthur v. Aird*, 1907 S.C. 1170.

⁸ *Arthur v. Aird*, *supra*.

⁹ *Grant v. Henry*, 1894, 21 R. 358.

¹⁰ *Bowie v. Marquis of Ailsa*, 1887, 14 R. 649; *Grant v. Henry*, *supra*.

¹¹ *Bowie v. Marquis of Ailsa*, *supra*, per Lord Trayner.

¹² *Duke of Richmond v. Dempster*, 1861, 4 Irv. 10; *Copland v. Maxwell*, 1871, 9 M. (H.L.) 1.

355. Where a river runs between the lands of different proprietors, each has the right of trout fishing *ex adverso* of his own property,¹ as the bed of the river belongs to the proprietor of each bank up to the *medium filum*.² In the case of small rivers, which with or without wading can be commanded from bank to bank, there is no rule confining the proprietor on one side of the river to his own side of the *medium filum* in fishing for trout. Proprietors on opposite sides of such a river are entitled to take joint action against a person who without permission fishes from either side in the water flowing between their estates.¹ In the case of a loch situated wholly within the lands of one proprietor, he has the exclusive right of trout fishing in the loch.³ Where a private loch is surrounded by the lands of two or more proprietors, the presumption is that each proprietor has a common right of fishing in the loch.⁴ A proprietor of the right of trout fishing may permit any person to fish in his river or loch. Such permission may be gratuitous or for a consideration.⁵ It would appear that a right to trout fishing cannot be acquired as a servitude, and is not capable of being made a real burden in favour of a person who does not own the lands adjoining the water.⁶

356. A right of salmon fishing carries with it the lesser right of trout fishing, but a person having such right is not entitled to prevent the proprietor of ground bounding the river, or anyone authorised by him, from fishing for trout in the salmon water *ex adverso* of his property.⁷ When different proprietors possess salmon and trout fishing in the same water, the latter right must be exercised so as not to cause injury to the former.⁸

357. In public waters as distinct from private waters the general public have a right to fish for trout. Public waters are those which are navigable and tidal.

SUBSECTION (2).—*The Trout (Scotland) Acts.*

358. The Trout (Scotland) Act, 1845,⁹ prohibits all persons, except the proprietors of the adjacent lands or others having a right to fish, or holding a written permission from those who have a right to fish, from fishing for trout or other freshwater fish, under a maximum

¹ *Arthur v. Aird*, 1907 S.C. 1170.

² Bell's Prin., s. 1101.

³ *Montgomery v. Watson*, 1861, 23 D. 635.

⁴ *Macdonald v. Farquharson*, 1836, 15 S. 259; *Menzies v. Macdonald*, 1856, 2 Macq. 463; *Scott v. Lord Napier*, 1869, 7 M. (H.L.) 35; *Mackenzie v. Banks*, 1878, 5 R. (H.L.) 192; *Menzies v. Macdonald*, 1901, 3 F. 941.

⁵ *Somerville v. Smith*, 1859, 22 D. 279; *Menzies v. Macdonald*, 1854, 16 D. 827.

⁶ *Menzies v. Macdonald*, *supra*; *Patrick v. Napier*, 1867, 5 M. 683; *Earl of Galloway v. Duke of Bedford*, 1902, 4 F. 851.

⁷ Bell's Prin., s. 747; *Somerville v. Smith*, 1859, 22 D. 279.

⁸ *Carmichael v. Colquhoun*, 1787, 2 Hailes 1033; *Mackenzie v. Rose*, 1832, 6 W. & S. 31; *Somerville v. Smith*, *supra*; *Stuart v. M'Barnet*, 1868, 6 M. (H.L.) 123; *Warrand v. Watson*, 1906, 8 F. 1098.

⁹ 8 & 9 Vict. c. 26, s. 1.

penalty of £5. The Trout (Scotland) Act, 1860,¹ prohibits all persons from fishing for trout with any net, and declares double-rod fishing, cross-line fishing, set lines, otter fishing, burning the water, striking the fish with any instrument, or by pointing, to be illegal. It also prohibits putting lime into the water, or any other substance destructive to trout or other freshwater fish, with intent to destroy them. The penalty for each offence against the statute is a fine not exceeding £5, with forfeiture of the fish taken and instruments used, and payment of the whole expenses of conviction. The use of dynamite or other explosive is forbidden.²

SUBSECTION (3).—*Close Times.*

359. An annual close time for trout extending from 15th October to 28th February, both inclusive, is laid down in the Freshwater Fish (Scotland) Act, 1902,³ which is to be construed with the Acts of 1845 and 1860. To fish for, take, have in possession, or expose for sale between these dates any common trout is an offence punishable with a maximum penalty of £5.⁴ The Act does not prevent the removal of living trout from a stream or stank for the purpose of stocking ponds, rivers, or other waters.

SECTION 12.—EEL FISHING.

360. Eel fishing, like trout fishing, belongs to the proprietor of the adjacent lands as a pertinent without proof of possession of the right, and it has been held that a right to fish for eels by cruives may be acquired by possession as a part and pertinent by the proprietor of adjacent lands.

¹ 23 & 24 Vict. c. 45, s. 1.

² 2 Edw. VII. c. 29, s. 3; *Tennant v. Clark*, 1901, 4 F. (J.) 24; 3 Adam 539.

³ 2 Edw. VII. c. 29.

⁴ *Ibid.*, s. 1.

FIXTURES.

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SECTION 1.—INTRODUCTORY.

361. A fixture has been defined by an English judge as follows:—
 “The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition to the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim *quicquid plantatur solo, solo cedit*.”¹ The rule expressed in these words, or, as it is sometimes put, “*inædificatum (plantatum, satum) solo, solo cedit*,” is recognised by all the authorities as a maxim of the law of Scotland.² The legal questions which arise as to its application in any particular circumstances may be divided into two categories: one, whether the particular subject has or has not been annexed to the *solum* in a manner which the law recognises as constituting fixture; the other whether, assuming an affirmative answer to that question, a particular party has a right to have the fixture removed, in a question with the owner of the *solum*. As in certain cases, notably in *Marshall v. Tannoch Chemical Co.*,³ these questions are confused, it may be pointed out at

GENERAL AUTHORITIES.—Amos and Ferrard on Fixtures, 3rd ed.; Brown on Fixtures, 4th ed.; Atkin and Bowen on Fixtures; Bell, Com. i. 786; Hunter on Landlord and Tenant, 4th ed., i. 294; Rankine on Land-Ownership, 4th ed., 116; Rankine on Leases, 2nd ed., 276.

¹ Per Lord Chelmsford in *Brand's Trs. v. Brand*, 1876, 3 R. (H.L.) 16, at p. 23, reported as *Bain v. Brand*, 1 App. Cas. 762.

² Stair, ii. 1, 40; Bankt. ii. 1, 18; Ersk. ii. 1, 15; ii. 2, 4; Bell's Prin., s. 1473.

³ 1886, 13 R. 1042.

the outset, that the moveable or immoveable character of an article which has become a fixture does not depend in any degree upon the relationship of the parties between whom the question as to its ownership is raised. Whether these parties are heir and executor or landlord and tenant, the article, assuming the fact of fixture, has become immoveable and the property of the owner of the *solum*, and is none the less so because the executor in the one case, or the tenant in the other, may be entitled to disannex and assert a right of property in it.¹ Thus the machinery and other articles which are usually known as trade fixtures, if actually attached to the building, become *partes soli*, and the property of the landlord, although the tenant has a right to remove them at the end of the lease, and although, when so removed, they again become the property of the tenant.² An alternative view—that an article fixed to land or to a building never loses its identity as a moveable thing, but that the right to remove it depends upon the relationship of the parties between whom the question is raised—finds some support in the opinion of Lord Blackburn in *Wake v. Hall*; ³ in the decision of Buckley J. in *In re Hulse*; ⁴ and in *Dowell v. Miln*,⁵ a case which is questioned in *Howie's Trs. v. M'Lay*.⁶

SECTION 2.—WHAT CONSTITUTES A FIXTURE.

362. The question whether a particular thing has become a fixture, that is, has become a part of the soil, or of some building attached to the soil, is not to be solved by the mere consideration whether it is, as matter of fact, affixed to the soil or building. That consideration, as well as the degree or extent of its attachment, is to be taken together with other elements. These elements are: whether it can be removed *integre, salve et commode*, i.e. without the destruction of itself as a separate thing, or of the soil or building to which it is attached; whether its annexation was of a permanent or quasi-permanent character; whether the building to which it is attached was specially adapted for its use; how far the use and enjoyment of the soil or building would be affected by its removal; the intention of the party attaching it.⁷ Intention, however, in this question means intention discoverable from the nature of the article and of the building, and the manner in which it is affixed, not intention proved by extrinsic evidence, or deducible from the consideration, in cases between landlord and tenant, that the tenant in

¹ *Brand's Trs. v. Brand*, 1874, 2 R. 258; revd. 1876, 3 R. (H.L.) 16; 1 App. Cas. 762; *Miller v. Muirhead*, 1894, 21 R. 658; *Smith v. Harrison & Co.'s Trs.*, 1893, 21 R. 330; *Cowan & Sons v. Assessor for Midlothian*, 1894, 21 R. 812, per Lord Wellwood at p. 815; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Cowans v. Assessor for Forfarshire*, 1910 S.C. 810; 1 S.L.T. 263.

² *Miller v. Muirhead*, *supra*.

³ 1883, 8 App. Cas. 19.

⁴ [1905] 1 Ch. 406.

⁵ 1874, 1 R. 1180.

⁶ 1902, 5 F. 214.

⁷ Per Lord Wellwood in *Cowan & Sons v. Assessor for Midlothian*, 1894, 21 R. 812, at p. 817; see also per Lord Low in *Cowans v. Assessor for Forfarshire*, *supra*; and *Leigh v. Taylor*, [1902] A.C. 157.

attaching a fixture is not likely to have intended to make a present to his landlord.¹

363. From the number of these considerations it is plain that it is impossible to lay down any very exact rules as to what constitutes a fixture, and that each case must depend greatly upon its particular circumstances. The degree of attachment may be conclusive in extreme cases. Thus if an article is so firmly attached to the *solum* or to a building that it cannot be removed without resolving it into its constituent elements, there would seem no doubt that it is a fixture, whatever was the intention in so attaching it, or its adaptability to the structure to which it is attached.² A thing may be so attached merely by its own weight and size; and thus large leaden vessels, standing on the floor of a manufactory, were held to be fixtures, though they were not attached to the floor in any way, because they could not have been taken out of the building without melting them down.³ But as a general rule the fact that an article is not attached to the *solum* by any artificial means, but solely by its own weight, is a strong indication that it is not a fixture:⁴ a principle which forms a test which has been frequently applied to distinguish between fixed and moveable parts of machinery.⁵ The law on this point has been expressed by Lord Blackburn as follows:—“Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.”⁶

364. The question of intention, *i.e.* whether the article is annexed for the improvement of the *solum* or building, or merely for the better enjoyment of the article itself,⁷ is probably mainly instrumental in establishing the rule, that whereas doors and windows, or anything forming part of the original structure of a house, though easily moveable, are fixtures;⁸ carpets, grates, pictures, and mirrors, if attached to the

¹ *Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 193.

² *Elwes v. Maw*, 1802, 2 Smith's L.C., 12th ed., 188; Bell, Com. i. 786; *Dowall v. Miln*, 1874, 1 R. 1180; *Cochrane v. Stevenson*, 1891, 18 R. 1208, per Lord McLaren.

³ *Niven v. Pilcairn*, 1823, 2 S. 270; see also *Pole-Carew v. Western Counties Manure Co.*, [1920] 2 Ch. 97.

⁴ *Edinburgh Gas Commissioners v. Smart*, 1918, 1 S.L.T. 80 (shop counter); *Wansborough v. Maton*, 1836, 4 A. & E. 884 (barn resting on straddles); *Ex parte Astbury*, 1869, L.R. 4 Ch. 630 (weighing-machines sunk in earth).

⁵ *Fisher v. Dixon*, 1843, 5 D. 775; affd. 1845, 4 Bell's App. 286; *Longbottom v. Berry*, 1869, L.R. 5 Q.B. 123.

⁶ *Holland v. Hodgson*, 1872, L.R. 7 C.P. 328, at p. 335; see remarks on this in *Hobson v. Gorringe*, [1897] 1 Ch. 182.

⁷ See opinion of Blackburn J. in *Parsons v. Hind*, 1866, 14 W.R. 860.

⁸ *Johnson v. Dobie*, 1783, Mor. 5443; per Lord Cockburn in *Fisher v. Dixon*, 5 D. 775, at p. 796; *Boswell v. Crucible Steel Co.*, [1926] 1 K.B. 119.

floor and walls by any ordinary method, are not.¹ It is difficult to understand on what principle gas-fittings have been held not to be fixtures;² and they have been held to be part of the lands and heritage under the Valuation Acts.³ The consideration of special adaptation to the building was given effect to by Lord Mansfield in *Lawton's Exrs. v. Salmon*,⁴ where it was held that salt-pans were fixtures, because the salt springs in which they were used were no use without them. It is also the foundation of a rule adopted in order to distinguish between the fixed and moveable ornaments of a house, which is, that those statues, pictures, mirrors, and the like, which form a part of the architectural design, and are not easy to replace, are fixtures.⁵ So tapestry has been held to be moveable when fixed to the walls merely for its enjoyment as a separate subject;⁶ a fixture when part of the scheme of decoration of a room.⁷ Again, in certain cases the permanent or temporary character of the annexation is the ruling consideration. In such cases the permanency is to be judged relatively to the right of the person annexing; the mere fact that the annexation is made by a party whose right to the subject is temporary, and that he intends to remove it when he leaves, does not prevent its becoming a fixture.⁸ The meaning of temporary annexation may be shewn by an illustration employed by Lord Blackburn, in contrasting the anchor of a ship, which remains moveable though fixed in the soil, with the anchor of a suspension bridge, which is a fixture.⁹ Another illustration may be hazarded in the booths or other temporary erections put up for a fair, which, it is presumed, remain moveable though temporarily fixed to the ground. And seats in a music-hall, though clamped to the floor to satisfy the requirements of a local authority, were held to retain their character as independent chattels.¹⁰

SECTION 3.—PARTICULAR ARTICLES.

365. These general rules may be illustrated by a statement of some of the articles which have been decided to be or not to be fixtures. It will be convenient to take separately articles fixed to the soil, to a dwelling-house, and to a manufactory or mill.

¹ *Cochrane v. Stevenson*, 1891, 18 R. 1208; *Nisbet v. Mitchell Innes*, 1880, 7 R. 575; *Holland v. Hodgson*, 1872, L.R. 7 C.P. 328, per Lord Blackburn at p. 335.

² *Nisbet*, *supra*; *Cochrane*, *supra*, per Lord M'Laren at p. 1216.

³ *Cowans v. Assessor for Forfarshire*, 1910 S.C. 810.

⁴ 1782, 1 H. Bl. 259 n.

⁵ *D'Eyncourt v. Gregory*, 1866, L.R. 3 Eq. 382; *Norton v. Dashwood*, [1896] 2 Ch. 497; *Amos on Fixtures*, 3rd ed., p. 22; contrast *Nisbet v. Mitchell Innes*, *supra*, and *Cochrane v. Stevenson*, *supra*.

⁶ *Leigh v. Taylor*, [1902] A.C. 157.

⁷ *Whaley v. Roehrich*, [1908] 1 Ch. 615.

⁸ *Brand's Trs. v. Brand*, 1876, 3 R. (H.L.) 16; *Meux v. Jacobs*, 1875, L.R. 7 H.L. 481.

⁹ *Holland v. Hodgson*, 1872, L.R. 7 C.P. 328.

¹⁰ *Lyon v. London, Midland and City Bank*, [1903] 2 K.B. 135; approved in *Reynolds v. Ashby*, [1904] A.C. 466; see, however, *Vaudeville Electric Cinema v. Muriset*, [1923] 2 Ch. 74.

SUBSECTION (1).—*Articles fixed to the Soil.*

366. It may be taken as a general principle that all things planted in the ground with the intention that they should grow there become *partes soli*, though in certain cases, as will be shewn later, the planter may be entitled to remove them. In this category are trees,¹ shrubs, and turf,² and the vines in a vinery.³ But there is some doubt as to the legal character of the crops on a farm, or other industrial growing crops. Erskine states,⁴ “those annual fruits which require yearly seed and industry, as wheat, barley, etc., are accounted moveable even before separation, from the moment they are sown or planted,” and this is, in accordance with the rule in England, long established.⁵ But in *Chalmers’ Tr. v. Dick’s Tr.*⁶ it was held that such crops, while growing, were heritable, though a tenant had a right to reap and remove them so wide that it might in popular language be described as a right of property. Such crops are expressly included in the definition of the term “goods” in the Sale of Goods Act, 1893,⁷ but this does not affect their character as heritable or moveable.⁸

367. The ordinary appurtenances of an estate—gates, dykes, walls, and railings—even though of an ornamental character, and as a matter of fact detachable, are fixtures.⁹ The same may be said of any building with foundations sunk into the ground, whether erected for agricultural or trading purposes,¹⁰ or purely for pleasure, as a vinery or conservatory.¹¹ And an opinion has been expressed that garden-seats sunk in the ground, or a light wooden bridge thrown over a stream, would be fixtures.¹² But a building or article resting on, but not built into, the ground, or an erection on the ground, is not as a rule a fixture.¹³

SUBSECTION (2).—*Articles attached to a Dwelling-house.*

368. Of things attached to a dwelling-house, ordinary pieces of furniture, carpets, pictures, and mirrors are not fixtures as a general

¹ *Paul v. Cuthbertson*, 1840, 2 D. 1286; *Morison v. Lockhart*, 1912 S.C. 1017.

² *Burns v. Fleming*, 1880, 8 R. 226.

³ *Jenkins v. Gething*, 1862, 2 John. & H. 520.

⁴ Inst. ii. 2, 4.

⁵ See early authorities collected in Amos and Ferrard on Fixtures, 3rd ed., p. 266.

⁶ 1909 S.C. 761.

⁷ 56 & 57 Vict. c. 71, s. 62.

⁸ *Morison v. Lockhart*, *supra*.

⁹ *Stair*, ii. 1, 40; *Tod’s Trs. v. Finlay*, 1872, 10 M. 422; *Graham v. Lamont*, 1875, 2 R. 438; see *contra* as to temporary fencing, *Duke of Buccleuch v. Tod’s Trs.*, 1871, 9 M. 1014.

¹⁰ *Elwes v. Maw*, 1802, 2 Smith’s L.C., 12th ed., 188.

¹¹ *Ferguson v. Paul*, 1885, 12 R. 1222; *Buckland v. Butterfield*, 1820, 2 Brod. & B. 54; *Jenkins v. Gething*, *supra*.

¹² Per Lord Cockburn in *Fisher v. Dixon*, 1843, 5 D. 775, at p. 796; *D’Eyncourt v. Gregory*, 1866, L.R. 3 Eq. 382.

¹³ *Wansborough v. Maton*, 1836, 4 A. & E. 884; *Ex parte Astbury*, 1869, L.R. 4 Ch. 630, at p. 639.

rule.¹ The principle governing exceptional cases, where they are part of a scheme of decoration, has been already stated. Doors and windows have long been established as fixtures,² and it would seem that grates, gas-fittings, chandeliers, the rollers of blinds, curtain-poles, and picture-rods are now to be placed in the same category.³ Ordinary mantel-pieces would seem to be fixtures, ornamental ones not, or at least removable, in a question between heir and executor.⁴ A wall-paper is of course a fixture;⁵ and tapestry put up instead of a paper may be fixed so as to become so,⁶ if it is definitely part of the room. In the case last cited it was said by Lord Halsbury that a thing is not a fixture "unless it has become part of the house in any intelligible sense."

SUBSECTION (3).—*Machinery.*

369. In the case of a manufactory it is established that machinery strongly built in, or specially adapted to the particular premises, is fixed,⁷ while machinery merely resting on the building is not, unless it is of very exceptional size and weight.⁸ The doubtful case would seem to be where machinery is attached to the building, but only with bolts and screws for the purpose of steadying it. A series of cases have established, in England, that the fact of its being affixed makes it a fixture.⁹ In a Scottish case, however, the Lord Justice-Clerk (Moncreiff) intimated that he was not prepared to assent to this, and that he preferred the reasoning of Parke B. in *Hallawell* to that of Lord Blackburn in *Holland*.¹⁰

SECTION 4.—CONSTRUCTIVE FIXTURES.

370. In addition to those things which become fixtures by actual annexation to land or buildings, it is recognised that a thing not actually attached may become a fixture by constructive annexation. Constructive fixtures have been defined by Lord Cockburn as "things so fitted and constructed as to belong specially to the particular machinery, and not to be equally suited to any other."¹¹ A more general statement is made by Brett M.R., speaking of fixed machinery: "Everything which

¹ *Fisher v. Dixon*, 1843, 5 D. 775, per Lord Cockburn; *Cochrane v. Stevenson*, 1891, 18 R. 2108.

² *Johnson v. Dobie*, 1873, Mor. 5443; *Graham v. Lamont*, 1875, 2 R. 438, per Lord Ormisdale, 441.

³ *Cowans v. Assessor for Forfarshire*, 1910 S.C. 810; cp. *Jamieson v. Welsh*, 1900, 3 F. 176, and *Nisbet v. Mitchell Innes*, 1880, 7 R. 575.

⁴ *Bishop v. Elliott*, 1855, 24 L.J. Ex. 229; *Leach v. Thomas*, 1835, 7 C. & P. 327.

⁵ *D'Eyncourt v. Gregory*, 1866, L.R. 3 Eq. 382.

⁶ *Norton v. Dashwood*, [1896] 2 Ch. 497, but see *Leigh v. Taylor*, [1902] A.C. 157.

⁷ *Fisher v. Dixon*, 1843, 5 D. 775; affd. 1845, 4 Bell's App. 286; *Brand's Trs. v. Brand*, 1874, 2 R. 258; revd. 1876, 3 R. (H.L.) 16; and 1878, 5 R. 607; *Dowall v. Miln*, 1874, 1 R. 1180, per Lord Justice-Clerk Moncreiff.

⁸ Cases quoted above, and *Longbottom v. Berry*, 1869, L.R. 5 Q.B. 123.

⁹ *Walmesley v. Milne*, 1859, 7 C.B. (N.S.) 115; *Mather v. Fraser*, 1856, 2 Kay & J. 536; *Boyd v. Shorrock*, 1867, L.R. 5 Eq. 72; *Longbottom, supra*; *Holland v. Hodgson*, 1872, L.R. 7 C.P. 328, practically overruling *Hallawell v. Eastwood*, 1851, 6 Ex. 295.

¹⁰ *Dowall v. Miln*, 1874, 1 R. 1180.

¹¹ *Fisher v. Dixon*, 1843, 5 D. at p. 832.

is part of the machine is part of the land.”¹ Thus leathern belts, necessary for the machinery, but in themselves easily moveable, have been held fixtures.¹ The key of a door and the millstone of a mill are frequent illustrations.² Where an agricultural tenant was bound to apply all dung to the land it was held to be a fixture, so as to be heritable in his succession.³ A point of some doubt would seem to be the case where there are duplicates of separable but necessary parts of machinery. In the case of *Fisher*, such duplicates were held to be moveables;⁴ but in a more recent English case they were accounted fixtures, on the ground that, although the machine might be complete without them, still it was a more perfect machine with them.⁵

SECTION 5.—BUILDING AN ACCESSARY OF A MOVEABLE SUBJECT.

371. It has been suggested that a moveable subject may remain moveable even when affixed in a building, if, from their relative values, it may fairly be assumed that the building is a mere accessary of the moveable. Professor Bell reports a case in which a telescope was held moveable under such circumstances and for that reason.⁶ It is doubtful whether this rule would be applied in a modern case.⁷

SECTION 6.—RIGHT OF REMOVAL.

SUBSECTION (1).—By Contract.

(i) General.

372. In passing to the question, By whom may fixtures be removed? it may first be noted that it is within the power of anyone affixing a moveable subject to land, to stipulate by express contract for the right to remove it. He cannot, however, by any such stipulation, prevent the fixture becoming part of the land and the property of the landlord.⁸ The result of this is that the right to remove, though valid in a question with the landlord or his personal representatives, would not be enforceable in a question with a singular successor in the lands. Thus where a party erected a gas-engine in a saw-mill, on a contract for payment by instalments, and under an agreement that he should have the right to remove it if any instalment was not paid, it was held that a mortgagee was entitled to the engine, and that the agreement could not be enforced against him.⁹ It would appear, from the analogy of cases

¹ *Sheffield, etc., Building Society v. Harrison*, 1884, 15 Q.B.D. 358.

² Lord Cockburn in *Fisher v. Dixon*, *supra*; *Barr v. McIlwham & Speirs*, 1821, 1 S. 124 (factory bell); Crowder J. in *Walmsley v. Milne*, 1859, 7 C.B. (N.S.) 115, at p. 138.

³ *Reid v. Reid*, 1890, 17 R. 519.

⁴ 5 D. at p. 832.

⁵ *Ex parte Astbury*, 1869, L.R. 4 Ch. 630, at p. 634.

⁶ Bell, Com. i. 787.

⁷ See *Tod's Trs. v. Finlay*, 1872, 10 M. 422.

⁸ *Hobson v. Gorrington*, [1897] 1 Ch. 182; *Reynolds v. Ashby*, [1904] A.C. 466.

⁹ *Hobson v. Gorrington*, *supra*, distinguishing *Cumberland Union Banking Co. v. Maryport, etc., Co.*, [1892] 1 Ch. 415, and *Gough v. Wood*, [1894] 1 Q.B. 713; and approved as applicable to Scots law in *Howie's Trs. v. M'Lay*, 1902, 5 F. 214.

relating to the sale of standing trees,¹ that a trustee in the landlord's sequestration would, in similar circumstances, be entitled to prevent the removal of the fixture. But a trustee in a private trust deed for creditors has no higher right than the party from whom his title is derived.² When the creditor in a bond and disposition in security allows the debtor to remain in possession he authorises him to grant leases with all their ordinary incidents. One of these incidents is the right of the tenant to remove trade fixtures; and, consequently, it has been held that the creditor, having impliedly authorised the removal of trade fixtures, could not prevent it by entering into possession.³

(ii) *Sales of Standing Trees.*

373. At common law it was established that, where standing trees were sold and still uncut, a singular successor of the seller, unless he acquired his right with notice that the trees had been sold, was entitled to claim them as fixtures.⁴ They passed to the trustee on the seller's bankruptcy,⁵ and, when the seller was an heir of entail, could be claimed by a succeeding heir.⁶ By the Sale of Goods Act, 1893, s. 62, the term "goods" is defined as including "industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." In *Morison v. Lockhart*,⁶ where a succeeding heir of entail claimed trees which had been sold by his predecessor, it was considered, though not decided, whether this definition is wide enough to cover standing trees.⁷ Assuming that it was, it was decided that the pre-existing law had not been altered, because the particular contract could not be regarded as a sale, which would, under the Act, and if the parties so intended, vest the property in the trees in the purchaser at the time when the contract was made, but merely as an agreement to sell, under which the property in the trees would not pass, in respect that while still uncut they were not in a deliverable state. It was in consequence held, in accordance with prior authorities, that the succeeding heir had a preferable right to the trees. This decision, proceeding largely on the terms of the particular contract, leaves the law in some doubt—a doubt which still remains where the trees are claimed by a singular successor of the seller or by his trustees in sequestration, though the view that the property in trees sold does not pass until they are cut is supported by the opinions in a recent English case.⁸

¹ *Paul v. Cuthbertson*, 1840, 2 S. 1286; *Morison v. Lockhart*, 1912 S.C. 1017.

² *Hogarth v. Smart's Tr.*, 1882, 9 R. 964.

³ *Richardson v. Ballachulish Slate Quarries*, 1918, 1 S.L.T. 413; *Ellis v. Glover*, [1908] 1 K.B. 388.

⁴ *Duff v. Brown*, 1817, 6 Paton 332.

⁵ *Paul v. Cuthbertson*, *supra*.

⁶ *Morison v. Lockhart*, *supra*.

⁷ On this point see *Kursell v. Timber Operators*, [1927] 1 K.B. 298.

⁸ *Kursell v. Timber Operators*, *supra*.

374. With regard to the case of a succeeding heir of entail, the law now acts on s. 7 of the Entail (Scotland) Act, 1914.¹ That section enacts, "Where the heir of entail in possession of any entailed estate in Scotland has sold or entered into a contract for the sale of any timber growing thereon which he is lawfully entitled to sell, but the timber so sold, or any part thereof, has not been severed from the ground at the date of the seller's death, such sale or contract to sell shall nevertheless be valid and enforceable as against the heir or heir of entail who may succeed to the seller in the possession of the said estate, to the same extent as it would have been valid and enforceable against the seller had he survived the completion of the severance: Provided that (a) the price paid or contracted to be paid for such timber, where no part thereof has been severed from the ground at the date of the seller's death, or where some part thereof has been so severed, then so much of such price as effeirs to the remainder, shall be a debt due and payable by the purchaser to the heir or heirs in possession at the date or dates of severance; and (b) the purchaser of such timber shall, if so required by the heir or heirs succeeding to the seller thereof, either consign in bank the amount of such price or part thereof as the case may be, or at the purchaser's option find caution for the payment of the same before beginning or continuing the severance of such timber."

SUBSECTION (2).—*Apart from Contract.*

375. In cases which are not ruled by express contract, the right to remove a fixture depends materially upon the character in which that right is asserted. Lord Ellenborough, in a well-known passage, has pointed out that the question usually arises between three classes of persons, viz. heir and executor, fiar and the executors of a liferenter, and landlord and tenant.² The right to remove is widest in the case of landlord and tenant, narrowest in that of heir and executor. Other cases are those of seller and purchaser, securities, and bankruptcy.

(i) *Between Landlord and Tenant.*

376. The right to remove fixtures, in a question between landlord and tenant, depends upon whether the subjects are used, under the lease, for trading, for agricultural, or merely for residential purposes. A leading English case³ established the rule that the right to remove trade fixtures did not extend to the case of an agricultural tenant, who therefore, if he erected buildings on his farm without any express contract, had to leave them at the end of a lease. This rule is recognised in Scotland,⁴ with an exception in the case of fences.⁴ The anomaly

¹ 4 & 5 Geo. V. c. 43.

² *Elwes v. Maw*, 1802, 2 Smith's L.C., 12th ed., 188.

³ *Thomson v. Oliphant*, 1822, 1 S. 307; *Hunter, Landlord and Tenant*, 4th ed., i. 313.

⁴ *Duke of Buccleuch v. Tod's Trs.*, 1871, 9 M. 1014.

has been removed by statute. The Agricultural Holdings (Scotland) Act, 1923,¹ repeating earlier legislation, provides (s. 29) that any engine, machinery, fencing, or other fixture affixed to a holding by a tenant, and any building erected by him thereon for which he is not under the Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. The right of removal is conditional on payment of rent, and satisfaction of the other obligations of the tenant; must be preceded by one month's notice in writing; and is subject to the right of the landlord to purchase the fixture or building.

377. In a lease of subjects used for trade, manufacture, or mining, it has long been recognised that a tenant who has put up certain fixtures for the purposes of his trade has a right to remove them at the end of the lease.² The general description of trade fixtures may be said to include all trade appliances and machinery, and all buildings removable without being taken to pieces, with the limit, probably, that the subject from which the fixtures are removed must not be entirely destroyed by the removal.³ Nursery gardeners have been held to be traders, and to be therefore entitled to remove conservatories.⁴ It has been held, in England, that a tenant is not entitled to remove buildings so constructed that they could only be removed by pulling them down and removing the materials;⁵ but in a Scottish case opinions were expressed that a market-gardener could remove the brick foundations on which his conservatories rested;⁴ and in the House of Lords, in a case where such buildings were held removable under an exceptional system of land tenure, Lord Bramwell intimated that they would also have been removable in a question between landlord and tenant.⁶ The right to remove fixtures may probably be enlarged or limited by an established local custom.⁷ It would appear to be established as a rule, in England, that a tenant who proposes to remove fixtures must do so before the end of the lease, on the ground that, after the relation of landlord and tenant has ceased to exist, the tenant has no further right to be on the premises,⁸ but no decision has yet extended this rule to Scotland.⁹ It may be pointed out that the right of a tenant over trade fixtures is not, during the currency of the lease, a real right of property in the fixtures, but a personal right to require delivery of them from the

¹ 13 & 14 Geo. V. c. 10.

² *Syme v. Harvey*, 1861, 24 D. 202; *Brand's Trs. v. Brand*, 1874, 2 R. 255; revd. 1876, 3 R. (H.L.) 16; first established in *Poole's case*, 1704, 1 Salk. 368.

³ See list of articles held trade fixtures in Rankine, *Leases*, 3rd ed., p. 249.

⁴ *Syme v. Harvey*, *supra*.

⁵ *Whitehead v. Bennett*, 1858, 27 L.J. Ch. 474.

⁶ *Wake v. Hall*, 1883, 8 App. Cas. 195, at p. 210.

⁷ *Amos and Ferrard on Fixtures*, 3rd ed., pp. 66-69.

⁸ *Barff v. Probyn*, 1895, 64 L.J. Q.B. 557; earlier cases collected there.

⁹ See *Houldsworth v. Brand's Trs.*, 1877, 4 R. 369.

landlord, and that this may therefore be transmitted in security, or absolutely, by assignation intimated to the landlord.¹

378. A tenant in a lease of residential subjects has not the same latitude of removal which is enjoyed in a trading lease. The contrast is shown in the case of conservatories, which a market-gardener may remove,² but an ordinary tenant may not.³ A tenant, however, has the right to remove fixtures of an ornamental character, though the exact limits of the right have not been determined. Thus a tenant has a right to remove an ornamental mantelpiece put up by him, but no right to remove a plain one.⁴ A similar right would seem to exist with regard to articles of ordinary domestic use. Besides pictures, carpets, and other things which are not fixtures, the tenant of a house has been held to be entitled to remove bookcases screwed to the wall,⁵ a pump,⁶ wooden steps on a garden path,⁷ and poster beds. And from a doubtful case it would appear that the Court will very readily infer, from the terms of a lease, or even from the actings of the parties and the knowledge of the landlord that the fixtures were to be put up, a right in the tenant to remove them.⁸

(ii) *Between Fiar and Representatives of Liferenter.*

379. The rights of the executor of a liferenter, in a question with the fiar, as to removal of fixtures, are more extensive than those of an executor against the heir, less extensive than those of a tenant against the landlord.⁹ The exact limits of his rights, however, are somewhat undefined. In *Martin v. Roe*¹⁰ the representatives of the rector of a parish were held to be entitled to remove hothouses, but this was a somewhat exceptional case; and in *D'Eyncourt v. Gregory*,¹¹ a case regarding the construction of a will, similar to the question between fiar and liferenter, the test put with regard to the decorations of a house was simply the question whether the articles in dispute were or were not fixtures.¹² On the other hand, it has been held, in England, that the representatives of a liferenter or other limited owner have a right to trade fixtures which is not apparently less than that of a tenant in a question with his landlord.¹³

¹ *Miller v. Muirhead*, 1894, 21 R. 658.

² *Syme v. Harvey*, 1861, 24 D. 202.

³ *Buckland v. Butterfield*, 1820, 2 Brod. & B. 54.

⁴ *Bishop v. Elliott*, 1855, 25 L.J. Ex. 229.

⁵ *Birch v. Dawson*, 1834, 2 A. & E. 37.

⁶ *Grymes v. Boweren*, 1830, 6 Bing. 437.

⁷ *Burns v. Fleming*, 1880, 8 R. 226.

⁸ *Ferguson v. Paul*, 1885, 12 R. 1222; questioned in Rankine on Leases, 3rd ed., p. 39.

⁹ *Elwes v. Maw*, 1802, 2 Smith's L.C., 12th ed., 188.

¹⁰ 1857, 7 E. & B. 237.

¹¹ 1866, L.R. 3 Eq. 382.

¹² See also *Murthly Castle* case in Brown on Fixtures, App. A, "Entail"; *Leigh v. Taylor*, [1902] A.C. 157.

¹³ *Lawton v. Lawton*, 1743, 3 Atk. 13 (steam-engine); *Ward v. Countess of Dudley*, 1887, 57 L.T. 20; *Beattie v. Hulse*, [1905] 1 Ch. 406.

(iii) *Between Heir and Executor.*

380. In a question between heir and executor, it would seem that the rule *inædificatum solo, solo cedit*, applies in full force. Everything which is in the legal sense of the word a fixture goes to the heir.¹ In this respect it is immaterial whether the fixtures were put up by a landlord on his own property or by a tenant on property held on lease, as the right of the tenant in trade fixtures, though not a right of property, is heritable in his succession.²

(iv) *Between Seller and Purchaser.*

381. In a question between seller and purchaser, the general rule is that a purchase of the lands includes a purchase of all fixtures, or, as it is sometimes put, the rule is the same as that between heir and executor.³ Details may be found in the former case. But it has been pointed out that between seller and purchaser the true question is what was the intention of the parties to the contract; and thus, while pictures of small value might, if fixed in some exceptional way, pass on the sale of a house, a picture of great value relatively to the value of the house would not unless, as in the case of a fresco, its removal was impossible without serious injury to the building.⁴ The sale of a house "with fixtures and fittings" will give the purchaser a right to such articles as grates, door-plates, and gas-fittings.⁵

(v) *In Questions of Securities and Bankruptcy.*

382. In a question between the holder of a bond and disposition in security and the trustee in the sequestration of the debtor, everything that is fixed to the subjects covered by the bond goes to the creditor. The trustee has no right of removal; the rules as between heir and executor apply.⁶ So also where the subject of the security is a lease, the tenant's right to remove trade fixtures is vested in the bondholder, to the exclusion of the trustee in the tenant's sequestration.⁷ A security granted by a tenant over trade fixtures is in effect an assignation in security of an incorporeal right, *i.e.* of the right to remove the fixtures, and may be completed by intimation to the landlord.⁸ The rights of third parties to remove fixtures in a question with a heritable creditor or a trustee in sequestration have already been considered.⁹

¹ *Fisher v. Dixon*, 1843, 5 D. 775; *affd.* 1845, 4 Bell's App. 286; *Brand's Trs. v. Brand*, 1874, 2 R. 258; *revd.* 1876, 3 R. (H.L.) 16.

² *Brand's Trs.*, *supra*.

³ *Nisbet v. Mitchell Innes*, 1880, 7 R. 575; *Cochrane v. Stevenson*, 1891, 18 R. 1208.

⁴ *Cochrane*, *supra*.

⁵ *Jamieson v. Welsh*, 1900, 3 F. 176.

⁶ *Arkwright v. Billing*, 13th December 1819, F.C.; *Howie's Trs. v. M'Lay*, 1902, 5 F. 214.

⁷ *Meux v. Jacobs*, 1875, L.R. 7 H.L. 481.

⁸ *Miller v. Muirhead*, 1894, 21 R. 658.

⁹ Para. 372, *supra*.

SECTION 7.—FIXTURES AS BETWEEN SUPERIOR AND VASSAL.

383. In the estimation of the annual value of lands in order to fix the amount due as a casualty of composition on the entry of a singular successor, it has been held that the annual value of fixtures is not to be included, unless they are of such a character that a tenant would not be entitled to remove them in a question with the landlord.¹ Without questioning the result arrived at in this case, it may be pointed out that it seems to have been reached on the theory that trade fixtures remain the property of the tenant: and it is submitted that that theory cannot be maintained in view of the decision of the House of Lords in *Brand's Trs. v. Brand*.²

SECTION 8.—DILIGENCE TO ATTACH FIXTURES.

384. The question whether a particular article should be attached by adjudication, as a part of the land, or by pointing, as a separate moveable, follows the rule which obtains between heir and executor. That is, if it is actually a fixture it is subject to adjudication, if not, to pointing. It would, however, appear that an article may be attachable either by pointing, as a moveable, or by adjudication, as a part of the lands.³ And it would seem to be doubtful by what diligence the right of a tenant in trade fixtures which he is entitled to remove can be attached. That right, as has been shown above, is incorporeal, and transmissible by intimated assignation, but is heritable in succession.⁴ The question would seem to be open whether such a right should be attached by adjudication or by arrestment.

SECTION 9.—VALUATION OF FIXTURES.

385. Questions as to fixtures have arisen in the interpretation of s. 42 of the Valuation Act, 1854,⁵ amended, as to erections or structural improvements made by lessees, by the Lands Valuation (Scotland) Amendment Act, 1895,⁶ whereby it is provided that all machinery fixed or attached to any lands or heritages shall be considered as lands and heritages, and valued accordingly. This provision has been held to subject all fixtures to valuation, the argument that it should be confined to those which a tenant would not be entitled to remove being repelled.⁷ A building may be a fixture and subject to valuation though it is constructed so as to be removable in sections, not if it is on wheels, and

¹ *Marshall v. Tannoch Chemical Co.*, 1886, 13 R. 1042.

² 3 R. (H.L.) 16; see other cases cited at commencement of this article.

³ See argument in *Arkwright v. Billing*, 3rd December 1819, F.C.

⁴ *Miller v. Muirhead*, 1894, 21 R. 658.

⁵ 17 & 18 Vict. c. 91.

⁶ 58 & 59 Vict. c. 41.

⁷ *Cowan & Sons v. Assessor for Midlothian*, 1894, 21 R. 812; *Cowans v. Assessor for Forfarshire*, 1910 S.C. 810; 1 S.L.T. 263; *Assessor for Dundee v. Carmichael*, 1902, 4 F. 525; *Weir v. Assessor for Glasgow*, 1924 S.C. 480.

moveable thereby.¹ But, by the Valuation Act, 1902,² s. 2, it is provided that in any building occupied for any trade, business, or manufacturing process, machinery shall not be included as lands and heritages if it is only so fixed that it can be removed without necessitating the removal of any part of the building.³ The exemption is confined to machinery in a building; it does not cover machinery in the open in a shipbuilding yard.⁴

¹ *Assessor for Glasgow v. Gilmartin*, 1920 S.C. 460.

² 2 Edw. VII. c. 25.

³ *Coatbridge and Airdrie Electric Supply Co. v. Assessor for Coatbridge*, 1907 S.C. 780; *Colville v. Assessor for Lanarkshire*, 1922 S.C. 460.

⁴ *Weir v. Assessor for Glasgow*, 1924 S.C. 670.

FLAG, LAW OF.

See INTERNATIONAL LAW.

FLAT.

See COMMON PROPERTY AND COMMON INTEREST.

FLOGGING.

See CRIME (PUNISHMENT).

FLOTSAM.

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FOOD AND DRUGS.

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SECTION 1.—THE STATUTES.

386. In the earlier part of the nineteenth century various statutes were enacted for the purpose of ensuring that food and drugs should be sold in a pure and genuine condition. For most purposes the earlier Acts have now been superseded by the Sale of Food and Drugs Acts, 1875 to 1927, and the various statutory rules and orders issued by Government Departments. These Acts consist of the Sale of Food and Drugs Act, 1875¹ (hereinafter called the principal Act); the Sale of Food and Drugs Amendment Act, 1879;² the Sale of Food and Drugs Act, 1899;³ and the Sale of Food and Drugs Act, 1927.⁴

SECTION 2.—ENFORCEMENT OF STATUTES.

387. It is the duty of every local authority entrusted with the execution of these statutes to appoint a public analyst and to put in force the powers with which they are invested, and in particular to direct their officers to take samples for analysis.⁵ If the local authority fail to execute or enforce any of the provisions of the Acts, the Scottish Board of Health⁶ may by order empower an officer of the Board to execute and enforce those provisions, or to procure the execution and enforcement thereof.⁷

¹ 38 & 39 Vict. c. 63.

² 42 & 43 Vict. c. 30.

³ 62 & 63 Vict. c. 51.

⁴ 9 & 10 Geo. V. c. 20.

⁵ 1899 Act, s. 3 (1).

⁶ 1927 Act, c. 20, s. 4.

⁷ 1899 Act, c. 51, s. 3 (2).

SECTION 3.—DEFINITIONS.

388. For the purposes of the Sale of Food and Drugs Acts, food includes every article used for food or drink by man, other than drugs or water,¹ and any article which ordinarily enters into or is used in the composition or preparation of human food, including flavouring matter and condiments. Drug includes medicine for internal or external use.² It is in each case a question of fact for the magistrate to determine whether an article is a drug or not. Thus where beeswax adulterated with paraffin was sold by a grocer, it was held in the circumstances not to be a drug the sale of which was covered by the Act.³

SECTION 4.—INJURIOUS COLOURING, STAINING, AND POWDERING.

389. By s. 3 of the principal Act it is provided that no person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered, under certain penalties. Under this section it is not sufficient to constitute an offence that the ingredient is injurious; the article itself must have been rendered injurious to health by being mixed with the ingredient.⁴ The section is contravened, however, if the article, though not harmful to every member of the community, is injurious to the health of a substantial part of it, *e.g.* invalids and children.⁵ An article is deemed to be injurious to health if it contains any of the preservatives forbidden to be used by the Scottish Board of Health.⁶

390. Sec. 4 of the principal Act contains similar provisions with regard to drugs. No person is liable to conviction under ss. 3 or 4 if he shews to the satisfaction of the Court that he did not know of the article or drug sold by him being so mixed, coloured, stained, or powdered, and that he could not with reasonable diligence have obtained that knowledge.⁷

SECTION 5.—ADULTERATION.

SUBSECTION (1).—*Selling Food or Drugs not of the Nature, Substance, and Quality demanded.*

391. By s. 6 of the principal Act, it is provided that no person shall sell to the prejudice of the purchaser any article of food or any drug

¹ 1875 Act, s. 2.² 1899 Act, s. 26.³ *Fowler v. Fowler*, 1896, 18 Cox C.C. 462; see also *Houghton v. Taplin*, 1897, 13 T.L.R. 386.⁴ *Hull v. Horsnell*, 1904, 20 Cox C.C. 759.⁵ *Cullen v. M'Nair*, 1908, 24 T.L.R. 692; *Haigh v. Aerated Bread Co., Ltd.*, [1916] 1 K.B. 878.⁶ See para. 423, *infra*.⁷ 1875 Act, s. 5.

which is not of the nature, substance, and quality of the article demanded by such purchaser, under a certain penalty; provided that an offence shall not be deemed to be committed under this section in the following cases:—

(1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or to conceal the inferior quality thereof.

(2) Where the food or drug is a proprietary medicine, or is the subject of a patent in force and is supplied in the state required by the specification of the patent.

(3) Where the food or drug is compounded as mentioned in the Act.

(4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

392. Under this section *mens rea* is not, as in ss. 3 and 4, necessary to constitute the offence. An innocent vendor is therefore liable for adulteration by dishonest servants,¹ and even for adulteration by strangers.² Either principal or agent may be convicted. A person who takes the article in his hand and performs the physical act of transferring the adulterated thing to the purchaser is a person who sells within the meaning of the section.³

SUBSECTION (2).—*What is Prejudice of the Purchaser?*

393. Prejudice is not confined to pecuniary prejudice or prejudice arising from the consumption of unwholesome food. The prejudice is that which the ordinary customer suffers, viz. that which is suffered by anyone who pays for one thing and gets another of inferior quality.⁴ There is a sale to the prejudice of the purchaser if a purchaser in the abstract would be prejudiced, though the actual purchaser may have special knowledge, not derived from the seller, that the article sold was not of the nature, substance, and quality demanded. The question is, what would be the position not of a skilled purchaser but of an ordinary person purchasing the article without any special knowledge?⁵ It is no defence to a prosecution under this section to allege that a purchaser, having bought only for analysis, was not prejudiced by the sale.⁶

394. No prejudice is suffered by the purchaser if, before the sale, he is informed that the article with which he is being supplied is not that which he demanded. Such information may be conveyed to the purchaser either orally⁷ or by means of a written or printed notice. But no label,

¹ *Brown v. Foote*, 1892, 66 L.T. (N.S.) 649.

² *Parker v. Alder*, [1899] 1 Q.B. 20.

³ *Hitchin v. Hindmarsh*, [1891] 2 Q.B. 81.

⁴ *Hoyle v. Hitchman*, 1879, 4 Q.B.D. 233.

⁵ *Morton v. Green*, 1881, 8 R. (J.) 36; *Pearks Gunston and Tee, Ltd. v. Ward*; *Hennen v. Southern Counties Dairy Co., Ltd.*, [1902] 2 K.B. 1.

⁶ 1879 Act, s. 2.

⁷ *Frew v. Gunning*, 1901, 3 F. 51.

placard, or other form of written or printed notice, whatever its terms, can have any effect at all, unless it is proved that the purchaser saw it before the sale, and that it was such as to leave him in no doubt that he was in point of fact being supplied with something different from that which in terms he asked for. In other words, if the seller of an adulterated article desires to protect himself, it is *ante omnia* necessary for him to prove that he actually acquainted the purchaser with the circumstance that he was not getting what he asked for.¹ The notice must clearly acquaint the purchaser not only with the fact but also with the character of the prejudice he is asked to accept. It must not be an ambiguous or equivocal notice, or one which yields its meaning and intent only to study and reflection, which it is unreasonable to expect from the ordinary customers of a shop. The notice must be such as in the place and circumstances in which it is exhibited will convey a clear and unambiguous intimation.²

SUBSECTION (3).—*Standards Applied.*

395. In a prosecution under s. 6 it is no defence to prove that the article of food or drug in question, though defective in nature or in substance or in quality, was not defective in all three respects.³ Quality means commercial quality, not commercial kind or description.⁴ Where a vendor is under contract to supply an article, breach of contract in respect of quality does not, in a sale to an inspector, constitute an offence if the article is not adulterated.⁵ Where the article said to have been adulterated is a compounded article, *e.g.* marmalade, for which there is no fixed standard, and where the adulteration is said to have consisted in the introduction of a substance *prima facie* innocuous, it is incumbent on the prosecutor to insert in the complaint such specification of the article said to have been adulterated, and of the effect of the injurious substance, as will make it clear that the accused did sell an article which was not of the nature, substance, and quality demanded.⁶ In the case of milk, butter, margarine, whisky, brandy, rum, and gin, fixed standards have now been imposed.⁷

396. With regard to drugs, the standard is generally supplied by the British Pharmacopœia. Under s. 15 of the Pharmacy Act, 1868,⁸ it is made an offence to compound any medicines of the British Pharmacopœia except according to its formularies. If a drug is to be found in the Pharmacopœia, and if that drug is asked for, no other may be sup-

¹ *Patterson v. Findlay*, 1925, J.C. 53, per Lord Justice-General Clyde at p. 57.

² *Brander v. Kinnear*, 1923, J.C., per Lord Justice-General Clyde at p. 47.

³ 1899 Act, s. 2.

⁴ *Anness v. Grivell*, [1915] 3 K.B. 685.

⁵ *Few v. Robinson*, [1921] 3 K.B. 504; contrast *Belfast Guardians v. Jones*, [1916] 2 I.R. 269.

⁶ *Wilson v. M'Cutcheon*, 1902, 5 F. (J.) 6, per Lord Low at p. 8.

⁷ See para. 410 *et seq.*, *infra*.

⁸ 31 & 32 Vict. c. 121.

plied; and if it is not sold with the ingredients and in the proportions prescribed by the Pharmacopœia, there is at least *prima facie* evidence that what is sold is not of the nature, substance, and quality demanded.¹ But the Pharmacopœia, though affording very strong *prima facie* evidence of what the drug ought to contain, is not the only standard, and in defence to a prosecution it is competent to show that there is a commercial standard different from that prescribed by the Pharmacopœia.² There is no presumptive standard in cases where the Pharmacopœia contains merely a description or recipe of how the drug ought to be made, and not the proportion of ingredients it ought to contain when sold.³

397. Where there is no fixed standard, the question whether the article sold is of the nature, substance, and quality demanded is one of fact for the magistrate to determine.⁴ In deciding it he is not entitled to bring his own private knowledge to bear, except to the extent that if he found that the article was of good quality, he might hold that the offence, though proved, was trivial.⁵ Sec. 6 applies to cases where the article sold is unadulterated but different from that demanded, *e.g.* where saffron was demanded and savin was supplied.⁶ But not every accidental introduction of deleterious matter into an article sold for food makes it different in nature, substance, and quality from the article demanded.⁷ With regard to the defence set up by subs. (4), it appears to be doubtful whether, when there is an unreasonable quantity of such extraneous matter found in any food or drug, it may not be the subject of prosecution.⁸

SECTION 6.—MIXTURES.

398. By s. 8 of the principal Act it is provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on, or with the article or drug, to the effect that the same is mixed. The label must be so written or printed that the notice of mixture given by the label is not obscured by other matter on the label.⁹ The Act,

¹ *Dickins v. Randerson*, [1901] 1 Q.B. 437.

² *Boots Cash Chemists (Southern), Ltd. v. Cowling*, 1903, 19 T.L.R. 370.

³ *Hudson v. Bridge*, 1903, 19 T.L.R. 369.

⁴ *M'Leod v. O'Neil*, 1882, 9 R. (J.) 32; *Wilson and M'Phee v. Wilson*, 1903, 6 F. (J.) 10; *Webb v. Knight*, 1877, 2 Q.B.D. 530; *Goulder v. Rook*, [1901] 2 K.B. 290.

⁵ *Reg. v. Field*, 1894, L.J., M.C. 158; *Shortt v. Robinson*, 1899, 19 Cox C.C. 243; *Preston v. Redfern*, 1912, 23 Cox C.C. 166.

⁶ *Knight v. Bowers*, 1885, 14 Q.B.D. 845.

⁷ *Goulder v. Rook*, *supra*.

⁸ *Warnock v. Johnstone*, 1881, 8 R. (J.) 55.

⁹ 1899 Act, s. 12.

however, does not hinder or affect the use of any registered trade mark or of a label which has been continuously in use since before 1st January 1893.¹

399. In order to comply with the provisions of this section it is not necessary to declare the nature and proportion of the substances admixed.² Where a label is supplied in terms of this section it is immaterial that the purchaser did not in fact see the label or had not his attention called to it. If the seller can prove that the purchaser had notice in fact that the article was adulterated or mixed, the latter cannot then be heard to say that the article was purchased by him to his prejudice. Notice in fact, therefore, is always a defence to a prosecution under s. 6. On the other hand, the object of s. 8 is to provide that in certain cases the seller will be protected if he takes certain precautions which will or may amount to something less than notice in fact to the purchaser that the goods are mixed. This protection is afforded to the seller if at the time of delivering the article he supplies a notice, *i.e.* a label. There is no contravention of this section if the label has been obscured at the request, either express or implied, of the purchaser or the person receiving the goods, *e.g.* where the goods have been wrapped in a paper parcel for purposes of delivery.³

SECTION 7.—ARTICLES ALTERED IN QUALITY BY ABSTRACTION.

400. By s. 9 of the principal Act it is provided that no person shall, with the intent that the same shall be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration.

401. The words "so altered" refer to a physical alteration of the article irrespective of the intent with which the alteration is made. The section does not prohibit the mere alteration of an article of food unless the alteration is coupled with the intent of selling the article in its altered state without notice. But where the alteration is followed by actual sale, the intent with which the article was altered is immaterial, since the injury to the purchaser is just the same whether there was a wrongful intent or not.⁴ The section is contravened if an article is sold in its altered state even when the vendor was unaware of the alteration.⁵ The provisions of a contract allowing a reduction of price in respect of deficiency of quality are no bar to a prosecution under the section.⁶ Disclosure may be made either by a label on the article⁷ or by a notice

¹ 1899 Act, s. 12.

² *Pope v. Tearle*, 1874, 9 C.P. 499; *Other v. Edgley*, 1893, 57 J.P. 457.

³ *Clifford v. Batley*, [1915] 1 K.B. 531.

⁴ *Dyke v. Gower*, [1892] 1 Q.B. 220; *Spiers & Pond v. Bennett*, [1896] 2 Q.B. 65.

⁵ *Pain v. Boughtwood*, 1890, 24 Q.B.D. 353.

⁶ *Fecitt v. Walsh*, [1891] 2 Q.B. 304.

⁷ *Jones v. Davies*, 1893, 69 L.T. 497.

exhibited in the shop.¹ It is doubtful whether the onus of proof of disclosure rests on the party charged, or whether the proof of non-disclosure does not lie on the prosecution as part of the definition of the offence.¹

SECTION 8.—SAMPLES AND ANALYSIS.

402. Secs. 13 to 16 of the principal Act provide for the procuring and analysis of samples of food and drugs. Samples may be procured by any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, under the direction and at the cost of the local authority appointing such officer, inspector, or constable, and charged with the execution of the Act. The person procuring the sample, if he suspects it to have been sold to him contrary to the provisions of the Act, must submit it to be analysed by the analyst of the place for which he acts.² After the purchase is completed he must forthwith notify to the seller or his agent his intention to have the article analysed by the public analyst. He must then divide the article into three parts, to be then and there separated, marked, and sealed up. One of the parts is delivered to the seller or his agent, one retained by the purchaser, and one submitted for analysis.³ It is an offence to refuse to supply such an officer applying to purchase any article of food, or any drug exposed to sale, and tendering the price for the quantity supplied.⁴ By s. 3 of the Act of 1879, such an officer is empowered to procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk, and to have the sample analysed in accordance with the provisions of the principal Act. The provisions of this section are extended to every article of food by s. 14 of the Act of 1899, with the proviso that no samples shall be taken except upon the request or with the consent of the purchaser or consignee.

403. An officer proceeding under s. 14 may employ a deputy or an independent third party to make the purchase for him.⁵ Secs. 12 to 15 and s. 17 all deal with cases in which the article is bought not for purposes of use as food or as a drug, but for the purpose of submitting it to analysis.⁶ The rules of procedure laid down in these sections must be strictly followed. It is a condition precedent to prosecution under these sections that at the time of the sale the officer should notify the seller that the article is being purchased for the purpose of analysis; he must notify his intention to have the article analysed, and must procure an analysis to be made.⁷ These rules, however, do not apply to the case of a private purchaser buying for consumption and not for analysis,⁸ nor

¹ *Spiers & Pond v. Bennett*, [1896] 2 Q.B. 65.

² Sec. 13.

³ Sec. 14; 62 & 63 Vict. c. 51, s. 13.

⁴ Sec. 17.

⁵ *Massey v. Kelso*, 1902, 4 F. (J.) 73.

⁶ *Hitchin v. Hindmarsh*, [1891] 2 Q.B. 181.

⁷ *Barnes v. Chipp*, 1878, 3 Ex. D. 176; *Whecker v. Webb*, 1887, 51 J.P. 661; *Smart & Son v. Watts*, [1894] 1 Q.B. 218.

⁸ *Buckler v. Wilson*, [1896] 1 Q.B. 83.

to cases in which an officer has obtained a sample under s. 3 of the Act of 1879¹ or s. 2 of the Margarine Act, 1907.² Thus it is not necessary for an officer obtaining a sample under s. 3 of the Act of 1879 to offer at the time of taking the sample to divide it into three parts.³ In proceeding under s. 14, the officer must notify the seller forthwith of his intention to have an analysis made; notification two days afterwards is too late.⁴ This notification may be given to any agent of the seller, and not necessarily to the agent who sold the article.⁵ Where several articles are purchased at the same time for the purpose of analysis, each article purchased must be divided into three parts and in other respects dealt with as required by s. 14.⁶ It is doubtful if an inspector is entitled to go into a shop and demand to have a sample out of any vessel he likes, but if he has already been supplied out of a particular vessel he is entitled to have a sample taken from it.⁷ So also where milk is supplied to the public out of a cran, an inspector may insist on being supplied in the same manner as the public.⁸

404. It is a condition precedent to conviction that the prosecutor, if required to do so on the motion of the defender, should produce at the trial the sealed sample.⁹ Each sample must be sufficient to admit of a proper analysis being made of it.¹⁰ It is the duty of the purchaser to take reasonable care to have the portions so sealed or fastened up as to be capable of analysis at the proper time. This does not mean that the article is to be so sealed up that the air cannot enter, and that the article will be imperishable and capable of analysis at the time when the vendor desires to have analysed the sample delivered to him. It means that the article is to be sealed or fastened up in such manner as its nature will permit with the exercise of reasonable care and circum-spection.¹¹ But it is not necessary to the success of a prosecution that the sample given to the vendor and the sample retained by the purchaser should be capable of being effectively analysed at the time when steps are taken for that end. Thus where a sample of milk given to the vendor had been destroyed through the bursting of a bottle owing to fermentation, and where the sample retained by the purchaser, though properly corked and sealed, was found to be incapable of effective analysis owing to decomposition, the vendor was convicted on the analyst's certificate, in the absence of exculpatory evidence.¹² When the article is purchased for the purpose of analysis, the production of the certificate of analysis

¹ *Morton v. Fyfe*, 1896, 24 R. (J.) 9; *Rouch v. Hall*, 1880, 6 Q.B.D. 17; *Harris v. Williams*, 1889, 6 T.L.R. 47; *Rolfe v. Thompson*, [1892] 2 Q.B. 196.

² *Monro v. Central Creamery Co., Ltd.*, [1912] 1 K.B. 578.

³ *Morton v. Fyfe*, *supra*.

⁴ *Parsons v. Birmingham Dairy Co.*, 1882, 9 Q.B.D. 172.

⁵ *Davies v. Burrell*, [1912] 2 K.B. 243.

⁶ *Mason v. Cowdary*, [1900] 2 Q.B. 419.

⁷ *Payne v. Hack*, 1894, 58 J.P. 165.

⁸ *Soutar v. Kerr*, 1907 S.C. (J.) 49.

⁹ Sec. 21; *Hutchison v. Stevenson*, 1902, 4 F. (J.) 69.

¹⁰ *Lowery v. Holland*, [1906] 1 K.B. 398.

¹¹ *Suckling v. Parker*, [1906] 1 K.B. 527; *Winterbottom v. Allwood*, [1915] 2 K.B. 608.

¹² *Chalmers v. M'Meeking*, 1921, J.C. 54.

is not essential in the case of a prosecution at the instance of a private person.¹ Where, however, the proceedings are at the instance of a public prosecutor, the production of the certificate is a condition precedent to prosecution.²

405. When a sample of milk is taken under s. 3 of the Act of 1879, nice questions may arise as to whether the milk was "in course of delivery" at the time when the sample was taken.³ Any question of this character must be determined according to the particular facts of the case, as where the lapse of time is such as to raise a doubt whether the sample taken is a sample taken in the course of delivery.⁴ Where samples of milk are taken from a number of different cans forming part of one delivery, and some are found to be deficient, only one offence is committed.⁵ No officer has power under this section to take samples of milk outside his own district.⁶

SECTION 9.—FORM AND EFFECT OF ANALYST'S CERTIFICATE.

406. Sec. 18 of the principal Act provides that the certificate of the analysis shall be in the form set forth in the schedule to the Act or to the like effect. In the absence of exculpatory evidence the analyst's certificate is conclusive of the facts stated therein.⁷ The certificate must state whether a change has taken place in the article that would interfere with analysis, and the omission of such a statement is fatal to conviction.⁸ The certificate must be a document in proper form, and ought to contain in it sufficient material to enable the Court to form a judgment on these materials whether the offence charged has been committed.⁹ The accused may require the analyst to be called as a witness, and at the request of either party to the case, the magistrate before whom any complaint is made may cause any article to be sent to the Commissioners of Inland Revenue for analysis at Somerset House.¹⁰ The certificate of the analyst, however, is not necessarily conclusive if there is other evidence to contradict it.¹¹

SECTION 10.—DEFENCE OF WRITTEN WARRANTY.

407. In certain cases a written warranty relied on by the accused may form a good defence to a prosecution under the Acts. If the accused satisfies the Court that he purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no

¹ *Buckler v. Wilson*, [1896] 1 Q.B. 83.

² *Pearl v. Barstow*, 1880, 44 J.P. 699.

³ *Semple v. Dunbar*, 1904, 6 F. (J.) 65; *Telford v. Fyfe*, 1908 S.C. (J.) 83.

⁴ *Helliwell v. Haskins*, 1911, 22 Cox C.C. 603; *Cox v. Evans*, 1917, 25 Cox C.C. 564.

⁵ *Telford v. Fyfe*, *supra*.

⁶ *M'Nair v. Cave*, [1903] 1 K.B. 24.

⁷ Sec. 21; *Chalmers v. M'Meeking*, *supra*.

⁸ *Hunter v. Wintrup*, 1904, 7 F. (J.) 22.

⁹ *Lee v. Bent*, [1901] 2 K.B. 270.

¹⁰ Sec. 22.

¹¹ *Todd v. Cochrane*, 1901, 3 Adam 357.

reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution but shall be liable in expenses unless he shall have given due notice that he will rely on this defence.¹ This defence, however, is not available to an accused unless he has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice, with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to that person.² The person by whom the warranty is alleged to be given is entitled to give evidence in the proceedings.³ Where the warranty has been given by a person resident outside the United Kingdom, it is not available in defence unless the accused proves that he had taken reasonable steps to ascertain, and did in fact believe, in the accuracy of the statement contained in the warranty.⁴ The defence of warranty extends to the servant of the person purchasing under warranty, provided the servant proves that he had no reason to believe the article was otherwise than that demanded by the prosecutor.⁵

408. A copy of the warranty is duly sent if it is posted within seven days after service of the complaint.⁶ The actual words of the warranty need not be set out provided its terms are clearly stated.⁷ Where the article is altered in any way the defence of warranty is inapplicable.⁸ Sec. 25 has been the subject of numerous decisions in England, and these, it would appear, owing to the doctrine of warranty peculiar to English law, may not be applicable to Scotland. The general principle, however, is the same in both countries, viz. that where an accused wishes to establish a defence under s. 25 he must shew that the written warranty on which he founds was a thing that he stipulated for as part of his contract.⁹ The written warranty may be given either at the time of purchase or at a subsequent date in pursuance of a stipulation forming part of the contract that such a written warranty should be produced.¹⁰ The contract to give a warranty may be a verbal one.¹¹ Where there is such a written warranty in the first instance, a label containing a warranty may be sufficient compliance with the statute, but not otherwise.¹⁰

409. Persons giving to a purchaser a false warranty in writing are liable in certain penalties unless they prove that when they gave the warranty they had reason to believe that the statements or descriptions

¹ Sec. 25.

² 1879 Act, s. 20 (1).

³ *Ibid.*, s. 20 (2).

⁴ *Ibid.*, s. 20 (3).

⁵ *Ibid.*, s. 20 (4).

⁶ *Retail Dairy Co., Ltd. v. Clarke*, [1912] 2 K.B. 388.

⁷ *Irving v. Callow Park Dairy Co.*, 1902, 87 L.T. 70.

⁸ *Hennen v. Long*, 1904, 20 Cox C.C. 608.

⁹ *Chalmers v. Morton*, 1922, J.C. 65; *Jeynes v. Hindle*, [1921] 2 K.B. 581.

¹⁰ *Jeynes v. Hindle*, *supra*.

¹¹ *Bacon v. Callow Park Dairy Co.*, 1902, 87 L.T. 70.

contained therein were true.¹ Penalties are also imposed for (1) forging or uttering any certificate or any writing purporting to contain a warranty; (2) wilfully applying to an article of food or a drug in any proceedings under the Act a certificate or warranty given in relation to any other article or drug; (3) giving a false warranty in writing to any purchaser in respect of an article of food or a drug; (4) giving a label with any article sold which falsely describes the article sold.²

SECTION 11.—REGULATIONS WITH REGARD TO SPECIFIC ARTICLES.

410. Under s. 4 (1) of the Act of 1899 the Board of Agriculture is empowered to make Regulations creating for certain articles of food standards of quality, and raising the presumption that articles falling below these standards are not genuine or are injurious to health.

SUBSECTION (1).—*Milk.*

411. Where a sample of milk (not being milk sold as skimmed or separated milk) contains less than 3 per cent. of milk fat it is presumed, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water.³ A similar presumption of adulteration obtains where the milk contains less than 8·5 per cent. of milk solids other than milk fat.⁴ In the case of skimmed or separated milk (not being condensed milk), adulteration is presumed when the sample contains less than 8·7 per cent. of milk solids other than milk fat.⁵

412. The presumptions established by these Regulations are not absolute, but may be redargued by competent evidence, the onus of proof being on the accused. If the evidence of the accused and his servants is believed, the onus is discharged, and it is not necessary to have the corroboration of neutral witnesses.⁶ The object of the Regulations is to ensure that milk will not be tampered with before sale either by the addition of water or the abstraction of fat or solids other than fat. Accordingly, it is a good defence to a charge if it is proved that the milk is sold as it came from the cow, even where the deficiency is due to a method of feeding deliberately adopted to produce quantity rather than quality of milk.⁷ The abstraction of fat or solids, however, need not be the result of deliberate human interference. Thus, where milk is allowed to stand in a vessel so that the cream rises to the top, and where a sample drawn from the bottom of the vessel is found to contain less than 3 per cent. of fat, the statute is contravened even although it is proved that there has been no tampering with the milk.⁸

¹ 1879 Act, s. 20 (6).

² *Ibid.*, s. 27.

³ Sale of Milk Regulations, 1901, s. 1.

⁴ *Ibid.*, s. 2.

⁵ Sale of Milk (Scotland) Regulations, 1914.

⁶ *Lamont v. Roger*, 1911 S.C. (J.) 24.

⁷ *Scott v. Jack*, 1912 S.C. (J.) 87.

⁸ *Penrice v. Brander*, 1921, J.C. 63; *M'Callum v. Brooks*, 1926, J.C. 39; the decision in *Knowles v. Scott*, 1918 S.C. (J.) 32, turned on a speciality in the form of the stated case.

SUBSECTION (2).—*Spirits, etc.*

413. By s. 10 of the Licensing Act, 1921, it is provided that, in determining whether an offence has been committed under the enactments relating to the sale of food and drugs by selling to the prejudice of the purchaser whisky, brandy, rum, or gin not adulterated otherwise than by any admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than thirty-five degrees under proof.¹

SUBSECTION (3).—*Butter and Margarine.*

414. Where the proportion of water in a sample of butter exceeds 16 per cent., it is presumed, until the contrary is proved, that the butter is not genuine by reason of the excessive amount of water therein.²

415. The manufacture and sale of butter and margarine are regulated by the Margarine Act, 1887,³ the Sale of Food and Drugs Act, 1899,⁴ and the Butter and Margarine Act, 1907.⁵ Butter is defined as the substance usually known as butter, made exclusively from milk or cream or both, with or without salt or other preservatives and with or without the addition of colouring matter. Margarine is defined as all substances, whether compounds or otherwise, prepared in imitation of butter and whether mixed with butter or not, and it is provided that no such substance shall be lawfully sold except under the name of margarine and under the conditions set forth in the Act.⁶ Margarine is further defined as "any article of food, whether mixed with butter or not, which resembles butter and is not milk-blended butter."⁷ It is an offence to manufacture, sell, expose for sale, or import any margarine the fat of which contains more than 10 per cent. of butter.⁸ Cheese means the substance usually known as cheese, containing no fat derived otherwise than from milk, and margarine cheese means any substance, whether compound or otherwise, which is prepared in imitation of cheese and which contains fat not derived from milk.⁹ The provisions of the Margarine Act apply to margarine cheese.¹⁰

416. Packages, whether open or closed, containing margarine, have to be marked "Margarine" in printed capital letters. Each parcel exposed for sale by retail must have a printed label "Margarine" attached in such manner as to be clearly visible to the purchaser.¹¹ Any substance purporting to be butter which is exposed for sale and not marked "Margarine" as provided by the Act is presumed to be exposed for sale as butter.¹² It is a good defence to a prosecution to prove that the accused purchased the article in question as butter, and with a written

¹ 11 & 12 Geo. V. c. 42, s. 10.

³ 50 & 51 Vict. c. 29.

⁶ 50 & 51 Vict. c. 29, s. 3.

⁹ *Ibid.*, s. 25.

¹² *Ibid.*, s. 10.

² Sale of Butter Regulations, 1902.

⁴ 62 & 63 Vict. c. 21.

⁷ 7 Edw. VII. c. 21, s. 13.

¹⁰ *Ibid.*, s. 5.

⁵ 7 Edw. VII. c. 21.

⁸ 1899 Act, s. 8.

¹¹ 50 & 51 Vict. c. 29, s. 6.

warranty or invoice to that effect, that he had no reason to believe at the time when he sold it that the article was other than butter, and that he sold it in the same state as when he purchased it.¹

417. Every occupier of a manufactory of margarine or margarine cheese, and every wholesale dealer in such substances, must keep a register shewing the quantity and destination of each consignment of such substances sent out from his manufactory or place of business.² Provision is made for the inspection of such manufactory and the taking of samples, and penalties are imposed for various offences in connection with the keeping of the register.³

418. Where any substance intended to be used for the adulteration of butter is found in any butter factory, the occupier of the factory is guilty of an offence.³ Any oil or fat capable of being so used, and found in the factory, is deemed to be intended to be so used unless the contrary is proved.³ If butter or margarine, when prepared for sale or consignment in any factory, contains more than 16 per cent. of water, the occupier of the factory or consignor is guilty of an offence unless he proves that the butter or margarine was not made, blended, re-worked, or treated in the factory.⁴ Similarly, any person who manufactures, sells, or exposes or offers for sale, or has in his possession for the purpose of sale, any milk-blended butter which contains more than 24 per cent. of water, is guilty of an offence.⁵

419. No person dealing in margarine may describe it in any wrapper, package, label, advertisement, or invoice by any name other than either margarine or a name combining the word margarine with a fancy or other descriptive name approved by the Board of Agriculture.⁶ Similar regulations apply to milk-blended butter.⁷ The Board of Agriculture are forbidden to approve of any name for use in connection with margarine or milk-blended butter if it refers to or is suggestive of butter or anything connected with the dairy interest.⁸

SUBSECTION (4).—*Horseflesh.*

420. The sale of horseflesh for human food is governed by the Sale of Horseflesh, etc., Regulation Act, 1889.⁹ Horseflesh is defined as including the flesh of asses and mules, and as meaning horseflesh cooked or uncooked, alone or accompanied by or mixed with any other substance (s. 7).

421. No person may supply horseflesh for human food to any purchaser who has asked to be supplied with some meat other than horseflesh, or with some compound article of food which is not ordinarily

¹ 50 & 51 Vict. c. 29, s. 7; cf. 1875 Act, s. 25.

² 62 & 63 Vict. c. 51, s. 7.

³ 7 Edw. VII. c. 21, s. 3.

⁴ *Ibid.*, s. 4 (1).

⁵ *Ibid.*, s. 4 (2).

⁶ *Ibid.*, s. 8; *Maypole Dairy Co., Ltd. v. Patterson*, 1923, J.C. 85; *Sommerville & Barr, Ltd. v. Chalmers*, 1925, J.C. 70.

⁷ 7 Edw. VII. c. 21, s. 9.

⁸ *Ibid.*, s. 10.

⁹ 52 & 53 Vict. c. 11.

made of horseflesh (s. 2). Horseflesh may not be sold, offered, exposed or kept for sale for human food, except in a shop, stall, or place bearing in a conspicuous position a notice indicating that horseflesh is sold there (s. 1). Where the provisions of s. 1 are not complied with, horseflesh exposed for sale is presumed to be intended for human food (s. 6).

422. Provision is made in the Act for the inspection of horseflesh, and the search of premises in which any officer of a local authority has reason for believing that there is kept or concealed any horseflesh which is intended for sale or for preparation for sale for human food (ss. 3 and 4); and the person in whose possession or on whose premises the meat is found is deemed to have committed an offence under the Act, unless he proves that such meat was not intended for human food (s. 5).

SECTION 12.—PRESERVATIVES IN FOOD.

423. The Scottish Board of Health, in the exercise of powers conferred on them under the Public Health (Scotland) Act, 1897, the Public Health (Regulations as to Food) Act, 1907, and the Butter and Margarine Act, 1907, may make regulations with reference to the use of preservatives in food. Articles of food contravening such regulations are deemed for the purposes of the Sale of Food and Drugs Act, 1875, to be injurious to health.¹ Three sets of regulations have been issued.² Food is defined as meaning food or drink intended for human consumption, and preservative as meaning any substance which is capable of inhibiting, retarding, or arresting the process of fermentation, acidification, or other decomposition of food, or of masking any of the evidences of putrefaction.³ It does not, however, include common salt (sodium chloride), saltpetre (sodium or potassium nitrate), sugars, glycerine,⁴ acetic acid or vinegar, lactic acid,⁵ alcohol or potable spirits, herbs, hop extract, spices and essential oils used for flavouring purposes, or any substance added to food by the process of curing known as smoking.³

424. The Order of 1925 contains two schedules. Schedule I. is in two parts, the first of which contains a list of preservatives permitted to be used in the proportions therein specified. The second part contains a list of prohibited preservatives and colouring matters. Schedule II. specifies a number of articles of food, viz. sausages, sausage meat, coffee extract, pickles and sauces, mince, and (where the proportion of benzoic acid exceeds 600 parts per million) grape juice and wine, and provides that any person selling these shall, at the time of exposing or offering for sale, label them in accordance with the rules set forth in the schedule. Where the article is sold by retail, labelling is unnecessary if a notice to the effect that the article contains preservative is exhibited

¹ 1927 Act, s. 1.

² S.R.O., 1925, No. $\frac{814}{S. 59}$; 1926, No. $\frac{1603}{S. 50}$; 1927, No. $\frac{623}{S. 35}$.

³ 1925, s. 2.

⁴ Added 1926.

⁵ Added 1927.

in a conspicuous position so as to be easily readable by a purchaser. It must be labelled, however, at the time when it is delivered.¹ The provisions with regard to labelling or notice do not apply to articles sold for consumption on the premises, and when the delivery of the article takes place on the vendor's premises, it need not be labelled if a notice is exhibited there.

425. The Sale of Food (Weights and Measures) Act, 1926, contains elaborate regulations with regard to weights and measures, and the methods of packing various articles of food, including meat, bread, and milk.²

¹ 1926, s. 2 (a) and (b).

² 16 & 17 Geo. V. c. 63.

FORCE.

FORCE AND FEAR.

See EXTORTION.

FOREHAND RENT.

See LEASE.

FOREIGN ENLISTMENT.

See CRIME.

FOREIGN JUDGMENT.

See INTERNATIONAL PRIVATE LAW.

FOREIGN LAWS.

See PROOF.

FOREIGN MARRIAGE.

See MARRIAGE.

FORESHORE.

See BOUNDARIES; FENCES; SEA; SEASHORE.

FORESTALLING.

See FAIRS AND MARKETS.

FORESTRY COMMISSIONERS.

See OFFICERS AND DEPARTMENTS OF STATE.

FORESTS.

See CROWN.

FORFEITURE.

See CASUALTIES OF SUPERIORITY; CRIME (PUNISHMENT); ENTAIL; IRRITANCIES.

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SECTION 1.—NATURE OF THE PLEA.

426. The plea of *forum non conveniens* is directed to the consideration of the justice and expediency of trying an action in a particular *forum*. In the earlier Scottish cases the plea was commonly stated as *forum non competens*, which is apparently a denial of jurisdiction: but the question raised is not one of the bare existence of jurisdiction, but rather of the exercise of a Court's discretion to decline, in certain circumstances, to exercise a jurisdiction which it undoubtedly possesses. Whether stated in the older form or in the now more commonly used expression *forum non conveniens*, the plea means that the *forum* is not appropriate,¹ that is to say, that there is another Court of competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and the ends of justice.²

427. The plea is frequently stated, but seldom sustained. It is most commonly relied on by foreign defenders, who object to jurisdiction being founded against them in this country merely by arrestment; but jurisdiction competently founded by arrestment being as extensive in its scope and operation as jurisdiction arising from any other source, the Court will not refuse to exercise it on the ground of a mere balance of convenience and inconvenience. "To refuse to entertain this action on the ground that it might be more appropriately tried in England, would really render jurisdiction by arrestment of funds of no use to the inhabitants of Scotland in the larger class of actions in which it is resorted to."³

¹ Per Lord Dunedin in *Société du Gaz de Paris v. Armateurs français*, 1926 S.C. (H.L.) 13, at p. 18.

² *Clements v. Macaulay*, 1866, 4 M. 583, per Lord Pres. Inglis at p. 592; *Sim v. Robinow*, 1892, 19 R. 665, per Lord Kinnear at p. 668; *Société du Gaz de Paris*, *supra*. In this case Lord Sumner was of opinion that the concurrence of the parties ought not to be considered, the sole question being which *forum* was preferable for securing the ends of justice.

³ Per Lord Justice-Clerk Hope in *Parken v. Royal Exchange Assurance Co.*, 1846, 8 D. 365, at p. 371.

428. A defender stating the plea must shew that he will be put to an unfair disadvantage, and not merely that he is less likely to succeed; and the Court must be satisfied not only of the inconvenience and possible injustice of trying the question in this *forum*, but that there is another competent *forum* to which not merely convenience but the justice and expediency of the case point as the proper tribunal.¹ Where an American sued in this country another American, against whom arrestments had been used, for implement of a contract entered into in the Confederate States of America, the plea was repelled, on the ground that the defender had failed to shew a more convenient *forum*.²

SECTION 2.—EFFECT OF SUSTAINING PLEA.

429. In earlier times it seems to have been the practice of the Court not to dismiss, but to sist, the action when the plea of *forum non conveniens* was sustained.³ In a later case⁴ Lord Kinnear expressed the opinion that “if this Court is not a convenient *forum* for the trial of the cause, then the action ought to be dismissed, but if this Court is a convenient *forum*, then I can see no reason why the action should not go on in the ordinary way.” This view was adopted by the Court in the case of *Atkinson & Wood*.⁵ In that case Lord Stormonth-Darling had sustained the plea of *forum non conveniens*, and sisted the cause for six months to enable the pursuer to preserve arrestments on the dependence till he should raise and follow forth an action in England. On a reclaiming note the Court recalled this interlocutor and dismissed the action. Lord Stormonth-Darling had proceeded on the authority of the two early cases of *Hawkins*⁶ and *Fordyce*,⁷ in which the action was sisted to enable the pursuer to preserve arrestments on the dependence. The Court distinguished these cases on the ground that in them an action had already been raised in England, while in the case before the Court the English action had not yet been raised. But opinions were expressed that the earlier cases ought to be reconsidered. Where, however, “it is doubtful whether the Court of the *forum conveniens* may have it within their power to give the pursuer a full remedy or to enforce their order against the persons of trustees and the trust estate, the Court of Session will not dismiss the suit, but will sist procedure, not with the view of superseding but of aiding the action and supplementing the powers of the foreign Court in order that full justice may be done.”⁸

¹ *Clements v. Macaulay*, 1866, 4 M. 583; *Sim v. Robinow*, 1892, 19 R. 665; *Low v. Low* (O.H.), 1893, 1 S.L.T. 43; *Montgomery v. Zarifi*, 1917 S.C. 627, per Lord Mackenzie at p. 643.

² *Clements v. Macaulay*, *supra*.

³ *Munro v. Graham*, 1839, 1 D. 1151; *Cochrane v. Paul*, 1857, 20 D. 178; *Tulloch v. Williams*, 1846, 8 D. 657; *Thomson v. North British and Mercantile Insurance Co.*, 1868, 6 M. 310, per Lord Justice-Clerk Patton at p. 313.

⁴ *Sim v. Robinow*, *supra*.

⁵ *v. Mackintosh*, 1905, 7 F. 598.

⁶ *Hawkins v. Wedderburn*, 1842, 4 D. 924.

⁷ *Fordyce v. Bridges*, 1842, 4 D. 1334.

⁸ *Orr-Ewing's Trs. v. Orr-Ewing*, 1885, 13 R. (H.L.) 1, per Lord Watson at p. 27; cf. *James Howden & Co. v. Powell Duffryn Steam Coal Co.*, 1912 S.C. 920; *Foster v. Foster's Trs.*, 1923 S.C. 212.

SECTION 3.—WHEN PLEA IS APPROPRIATE.

SUBSECTION (1).—*Actions against Foreign Executors.*

430. The cases in which the plea has been sustained have, almost without exception, special features which make it difficult to lay down any general principle on the matter. They are “chiefly of two classes: first, where foreign executors have been called to account in this country for the executry estate situated in a foreign country. In these cases the question always was, whether it was for the true and legitimate interest of the executry estate and all the claimants that the distribution should take place where the executors have had administration. There is of course, in most cases, a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases. The law of the executry estate is the law of the country where administration is had; and there generally are the papers, the property, and the parties concerned.”¹

431. On these grounds the plea was sustained in two cases² in which foreign executors were called to account in this country for executry estate situated abroad. But when the executor of an English will relating solely to English property was resident in Scotland, and was there sued for implement, the jurisdiction was sustained, on the ground that no order of the Court of Chancery, to which the defender offered to appeal, could at that time be enforced against him when resident in Scotland.³ And it may be said that except in special circumstances an English administrator, domiciled and resident in this country, may be sued here in an action dealing with the executry estate.⁴ The plea has been repelled where the testator was possessed of large estates in Scotland, notwithstanding that the estate had been made the subject of an administration suit in the Court of Chancery in England.⁵ In *Brown's* case the testator was domiciled in Scotland, and although probate had been granted in England, the executors had also been confirmed in Scotland. In these circumstances an action by a legatee for payment of his legacy was allowed to proceed. In the case of the *Carron Co.* a limited company brought an action against the executors of a deceased agent for a balance alleged to be due on his account. The deceased was a domiciled Englishman, but he had large estates in Scotland, and the executors had taken out confirmation. In an action of accounting in the Court of Session against the English executors of a man who died possessed of entailed estates in Scotland, and also of estates in the

¹ Per Lord Justice-Clerk Inglis in *Clements v. Macaulay*, 1866, 4 M. 592.

² *Brown's Trs. v. Palmer*, 1830, 9 S. 224; *Macmaster v. Macmaster*, 11 S. 685; and see *Grant's Trs. v. Douglas Heron & Co.*, 1796, 3 Pat. 503; *Gillon & Co. v. Dunlop and Collett*, 1864, 2 M. 776.

³ *Peters v. Martin*, 1825, 4 S. 107 (N.E. 108).

⁴ *Morison v. Ker*, 1790, Mor. 4601; *Scott v. Elliot*, 1797, Mor. 4845; *Campbell v. Rucker*, 1809, Hume, Dec. 258.

⁵ *Brown v. Maxwell's Exrs.*, 1883, 10 R. 1235; *Carron Co. v. Stainton*, 1857, 19 D. 318.

West Indies—of all of which the English Court of Chancery had undertaken the administration—the plea was sustained as regarded the rents of the West Indian property, but repelled as regarded the apportionment of the Scottish rents.¹ In *Gemmell*² the action was an action for reduction of a will, and Lord Ardwall sustained the plea of *forum non conveniens* in the following circumstances:—The will was executed and probate had been granted in England, the executor and the beneficiaries under the will were domiciled there, the witnesses were all resident there, and there was a suit depending in the Court of Chancery between the executor and the testator's marriage-contract trustees, who held practically the whole estate of the testator.

SUBSECTION (2).—*Partnership Actions.*

432. “Another class of cases relates to partnership. Here again there is a manifest expediency in trying all questions at the partnership domicile, where the books and property may be expected to be, and where the partners themselves concurred in carrying on business. In that class of cases also the Court is always willing to listen to this plea. It has regard to the interests of the whole parties generally.”³ The plea was sustained where the executors of a deceased partner in an Indian business raised an action of count and reckoning in regard to the partnership against the surviving partner, who was living temporarily in Scotland. The defender stated that he had already entered into an accounting with the Administrator-General of Madras, who had, under the pursuer's instructions, taken out letters of administration, and the action was dismissed.⁴ But in an action by one of two joint adventurers, who were temporarily resident in this country, against the other for an account of the proceeds of a joint adventure entered into in South Africa, the plea was repelled on the ground that the question depended on a mere balance of convenience.⁵

SUBSECTION (3).—*Actions on Contract.*

433. The plea has been stated in several recent cases relating to contracts. In *Anderson, Tulloch & Co. v. J. C. & J. Field*⁶ the contract was made in England between parties domiciled there, and was to be performed in London. The parties had no connection with Scotland, except that the pursuer had arrested a debt owed by a Scotsman to the defender. The pursuer's reason for bringing the action in Scotland was that under the law of England the contract (a verbal contract of

¹ *Martin v. Stopford-Blair's Exrs.*, 1879, 7 R. 329.

² *Gemmell v. Emery*, 1905, 13 S.L.T. 490.

³ Per Lord Justice-Clerk Inglis in *Clements v. Macaulay*, 1866, 4 M. 592.

⁴ *Adamson's Exrs. v. Mactaggart*, 1893, 20 R. 738.

⁵ *Sim v. Robinow*, 1892, 19 R. 665; and see *Lynch v. Stewart*, 1871, 9 M. 860; and *Rothfield v. Cohen* (O.H.), 1919, 1 S.L.T. 138.

⁶ (O.H.), 1910, 1 S.L.T. 401.

sale for goods of greater value than £10) was void under the Statute of Frauds. In these circumstances Lord Mackenzie held that Scotland was not *forum conveniens*, and dismissed the action. In *Powell v. Mackenzie & Co.*¹ the plea was sustained although the contract was made in Scotland, but the parties were both domiciled in England, and the action was an action for delivery of goods situated there. The Court also gave effect to the plea in a somewhat exceptional case,² where a foreigner, visiting this country, was sued for damages for neglecting his duty as commissioner and attorney in Jamaica, and for a balance on his factorial accounts. The defender bound himself to answer in the Courts of Jamaica, and the action was sisted. Under the modern practice it would probably have been dismissed. The plea was repelled where a domiciled Englishman sued an English insurance company, against which jurisdiction had been founded by arrestment, for the amount of a policy prepared in London but transmitted to Edinburgh agents, by whom it was delivered to the insured.³ The contract was admittedly regulated by English law, but the Scotch jurisdiction was upheld.

434. A French firm who had founded jurisdiction by arrestment sued French shipowners for damages for breach of contract in respect of a cargo of coal which, by charter-party executed in France, the defenders had contracted to ship to England and to deliver to the pursuer at Rouen, but which had been lost through the sinking of the ship on the high seas. The pursuers alleged that the ship was improperly loaded and unseaworthy, and that she belonged to a class of vessels of French design which were so unstable as to have been the subject of report by a French Senatorial Commission, which had made recommendations as to structural alterations which the defenders disregarded. The defenders pled that the bulk of the evidence would be French, that French witnesses could not be compelled to attend in a Scotch Court, and that the law of France afforded them a defence by way of limitation of liability of which they would be deprived in the Scotch Court. The plea of *forum non conveniens* was sustained.⁴

SUBSECTION (4).—*Actions of Damages.*

435. A widow raised an action of damages against an English railway company for the death of her husband on a level-crossing. A question of the English law of trespass being involved, and the *locus* and all the witnesses being in England, the Court dismissed the action.⁵ But in a subsequent case, where the circumstances were somewhat similar, the plea was repelled by Lord Stormonth-Darling.⁶ In that case a

¹ 1900, 8 S.L.T. 182; see also *Hine v. MacDowall*, 1897, 5 S.L.T. 12.

² *Tulloch v. Williams*, 1846, 8 D. 657.

³ *Parken v. Royal Exchange Assurance Co.*, 1846, 8 D. 365.

⁴ *Société du Gaz de Paris v. Armateurs français*, 1925 S.C. 332; 1926 S.C. (H.L.) 13.

⁵ *Williamson v. North-Eastern Rly. Co.*, 1884, 11 R. 596.

⁶ *M'Laughlin v. London and North-Western Rly. Co.*, 1899 (O.H.), 7 S.L.T. 248.

widow resident in Ireland brought an action against the London and North-Western Railway Company for damages for the death of her son. Here also the *locus* and the witnesses were in England, but *Williamson's* case was distinguished on the ground that there a question of the English law of trespass arose, while in *M'Laughlin* the only difference between the law of Scotland and the law of England was, that in England *solatium* was excluded as a head of damage. On the other hand, the decision in *Williamson* was followed by Lord Kincairney in a case of breach of promise.¹ The plea was repelled in a case where a person alleged to be domiciled in England arrested Scottish funds belonging to an English newspaper circulating in this country, and brought against it an action of damages for slander.²

SUBSECTION (5).—*Bankruptcy.*

436. In bankruptcy cases the rule has been adopted that "where bankruptcy proceedings have once been instituted, no matter in what country, everyone interested in the estate must go there to have their claims settled.³ Thus in *Okell's* case, J. B., who had a trading domicile in England, filed a petition in the County Court at Burnley for liquidation of his affairs under the English Bankruptcy Act of 1869. His creditors resolved that his estates should be liquidated by arrangement and not in bankruptcy. They authorised one of two trustees appointed by them to proceed to Canada to investigate the affairs of a firm of B. & Co., of which J. B. was a partner. In Canada this trustee obtained possession of a sum of money which was to be applied in terms of an agreement in paying the creditors of B. & Co., and in paying the balance to J. B. He brought the fund to Scotland, where he resided, and the creditors of B. & Co. raised an action of multiplepinding in his name. The other trustee in the English liquidation pleaded *forum non conveniens*, and the Court sustained the plea and dismissed the action.

SUBSECTION (6).—*Where all Defenders not Subject to the Jurisdiction.*

437. The Court would probably refuse to exercise its jurisdiction against one of several defenders if the other parties interested as defenders were not subject to the jurisdiction.⁴ But the plea will not be sustained in a multiplepinding merely because one of the claimants is not subject to the jurisdiction and refuses to appear,⁵ or because the claimants to the fund are all resident abroad.⁶

¹ *Lane v. Foulds*, 1903, 11 S.L.T. 118.

² *Longworth v. Hope*, 1865, 3 M. 1049.

³ *Okell v. Foden*, 1884, 11 R. 906, per Lord Pres. Inglis at p. 911; see *Phosphate Sewage Co. v. Molleson*, 1876, 3 R. (H.L.) 77; and also 5 R. 1125, per Lord Pres. Inglis at p. 1138; *Wilson (Glasgow and Trinidad) v. Dresdner Bank (O.H.)*, 1913, 2 S.L.T. 437.

⁴ *Morley v. Jackson*, 1888, 16 R. 78; *Liqrs. of California Redwood Co. v. Walker*, 1886, 13 R. 810; and see *French v. Hohbach (O.H.)*, 1921, 2 S.L.T. 53.

⁵ See *Thomson v. North British and Mercantile Insurance Co.*, 1868, 6 M. 310.

⁶ *Hay v. Jackson & Co.*, 1911 S.C. 876.

SUBSECTION (7).—*Where Pending Action in Court of Concurrent Jurisdiction.*

438. Where concurrent jurisdiction exists, and a prior action has been raised in a foreign Court, the Court of Session will usually dismiss an action subsequently raised to try the same question.¹ "I am not aware," says Lord Watson in *Orr-Ewing's Trs. v. Orr-Ewing*, "of any authority in the law of Scotland for entertaining an action in the Court of Session against foreign trustees who can be called to account, and who are willing to account, in the proper *forum*."² Thus, in *Ferguson v. Buchanan* the Court held that it would be improper to entertain, and accordingly dismissed, an action of declarator as to the testator's domicile, concerning which the Court of Chancery in England had already appointed an inquiry to be made. But, as has already been seen, the mere fact that the estate of a testator has been made the subject of an administration suit in England does not necessarily lead to the dismissal of an action against the executors in the Court of Session.³

SECTION 4.—RESTRAINT TO FOREIGN ACTIONS.

439. The Court sometimes goes further than merely exercising, or refusing to exercise, its competent jurisdiction under the plea of *forum non conveniens*. Where it is the most convenient *forum*, and where action has been first taken in it, "or perhaps, in special cases, even although a prior action has been raised in the Court of another country,"⁴ the Court may interdict the parties from raising or prosecuting in a foreign Court proceedings to try the same question. "In such a case I think the prohibition should take the form of an interdict founded on the common-law right inherent in the Court."⁵ In the case cited the claimants in a Scottish liquidation were restrained from proceeding with an action in New York on the subject of their claim pending the liquidation.⁶

¹ See Mackay, Manual, p. 124; Maclaren, Court of Session Practice, p. 76; *Dawson's Trs. v. Macleans*, 1860, 22 D. 685; *Ferguson v. Buchanan*, 1890, 18 R. 120; *Munro v. Graham*, 1839, 1 D. 1151; *Fordyce v. Bridges*, 1842, 4 D. 1334; *Cochrane v. Paul*, 1857, 20 D. 178; see also *Atkinson & Wood v. Mackintosh*, 1905, 7 F. 598; *Orr-Ewing v. Orr-Ewing's Trs.*, 1884, 11 R. 600; 13 R. (H.L.) 1, at p. 14.

² *Orr-Ewing*, *supra*, 13 R. (H.L.) 1, at p. 27; see *Lawford v. Lawford's Trs.*, 1927 S.C. 360.

³ *Carron Co. v. Stainton*, 1857, 19 D. 318; *Brown v. Maxwell's Exrs.*, 1883, 10 R. 1235.

⁴ Mackay, Manual, p. 124.

⁵ Per Lord Pres. Inglis in *California Redwood Co. v. Merchant Banking Co. of London*, 1886, 13 R. 1202.

⁶ See also *Young v. Barclay*, 1846, 8 D. 774.

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See DILIGENCE OF CREDITORS.

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FRANCHISE AND ELECTION LAW.

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PART I.—FRANCHISE.

SECTION 1.—INTRODUCTORY.

440. The term franchise is used primarily to define the qualification entitling a person to become an elector and to vote, and the procedure regulating the election of a member of Parliament. With the development of municipal and local government on the parliamentary model, the term has been extended to apply to similar matters in relation to all local and administrative bodies based upon the elective representative principle. A further extension has resulted from the adoption of parliamentary election procedure to pollings taken to determine specified issues referred directly for decision to an electorate under a particular statute.

SECTION 2.—PARLIAMENTARY CONSTITUENCIES.

SUBSECTION (1).—*Historical.*

441. From the Union in 1707 until 1832 there were 45 elected representatives in the British Parliament—30 chosen by the counties and 15 by the royal burghs. Under the Reform Act, 1832, the number was increased to 53 members—30 for counties or combined counties, and 23 for towns or districts or burghs, Edinburgh and Glasgow each returning 2 members.

442. By the Representation of the People Act, 1868, Scotland obtained 7 additional members, including 1 member returned jointly by Edinburgh and St. Andrews Universities, and 1 jointly by Glasgow and Aberdeen Universities. A third member was given to Glasgow with the limitation in the interest of minorities that no person should be entitled to vote for more than two candidates at an election, and Dundee was given a second member. The counties of Lanark, Ayr, and Aberdeen were each divided into two constituencies and given an additional member. Peebles and Selkirk were combined to form one constituency, and the Hawick District of Burghs was created a new constituency.

443. Under the Redistribution of Seats Act, 1885, which was based upon the principle of single-member constituencies and approximate equalisation of electoral districts, the number was still further increased from 60 to 72 members. The Haddington and Wigtown Districts of Burghs ceased to exist as separate constituencies. Glasgow was divided into 6, Edinburgh into 4, and Aberdeen into 2 single-member constituencies. Lanarkshire was divided into 6, and Fife, Perth, and Renfrewshire each into 2 single-member constituencies. Dundee alone remained an undivided two-member constituency.

SUBSECTION (2).—*Existing Scottish Constituencies.*

444. Under the Representation of the People Act, 1918, the number of members of the House of Commons was increased from 670 to 707, but this number was reduced in 1922 to 615 members by the exclusion from representation of the Irish Free State. The redistribution of seats under the Act practically adopted the recommendations of the Report, dated 27th January 1917, of the Speaker's Conference on Electoral Reform. The leading principle was that each vote recorded should, as far as possible, command an equal share of representation in the House of Commons. The standard unit of population for each member was taken at 70,000, but while a county or burgh with a population of less than 50,000 ceased to have separate representation, a county or burgh with 50,000 but less than 70,000 continued to have separate representation, and municipal burghs or urban districts with 70,000 became parliamentary burghs.

445. The result of the application of these tests to Scotland was far reaching. Several of the counties and burghs or districts of burghs ceased to exist as separate constituencies, or were combined with others to form new constituencies, while new constituencies, both county and burgh, were created in the more densely populated areas. Scotland is now represented by 74 members, who are returned by 38 county and 31 burgh, or district of burghs, single-member constituencies, one undivided two-member constituency (Dundee), and the combined four Scottish Universities, a single constituency with 3 members, according to the principle of proportional representation, each elector having one transferable vote.

446. The following table details the several constituencies, places of election, and returning officers:—

I. PARLIAMENTARY BURGHS.¹

Name of Parliamentary Constituency.	Burgh in which the Place of Election is situated.	Returning Officer.
Aberdeen—		
North Division . . .	Aberdeen .	Sheriff of Aberdeen, Kincardine, and Banff.
South Division . . .	" .	" " "
Ayr District of Burghs . .	Ayr . .	Sheriff of Ayr.
Dumbarton District of Burghs	Dumbarton .	Sheriff of Stirling, Dumbarton, and Clackmannan.
Dundee . . .	Dundee .	Sheriff of Forfar.
Dunfermline District of Burghs	Dunfermline .	Sheriff of Fife and Kinross.
Edinburgh—		
Central Division . . .	Edinburgh .	Sheriff of the Lothians and Peebles.
East Division . . .	" .	" " "
North Division . . .	" .	" " "
South Division . . .	" .	" " "
West Division . . .	" .	" " "
Glasgow—		
Bridgeton Division . . .	Glasgow .	Sheriff of Lanark.
Camlachie Division . . .	" .	" "
Cathcart Division . . .	" .	" "
Central Division . . .	" .	" "
Gorbals Division . . .	" .	" "
Govan Division . . .	" .	" "
Hillhead Division . . .	" .	" "
Kelvingrove Division . .	" .	" "
Maryhill Division . . .	" .	" "
Partick Division . . .	" .	" "
Pollok Division . . .	" .	" "
St. Rollox Division . . .	" .	" "
Shettleston Division . .	" .	" "
Springburn Division . .	" .	" "
Tradeston Division . . .	" .	" "
Greenock . . .	Greenock .	Sheriff of Renfrew and Bute.
Kirkcaldy District of Burghs .	Kirkcaldy .	Sheriff of Fife and Kinross.
Leith . . .	Edinburgh .	Sheriff of the Lothians and Peebles.
Montrose District of Burghs .	Dundee .	Sheriff of Forfar.
Paisley . . .	Paisley .	Sheriff of Renfrew and Bute.
Stirling and Falkirk District of Burghs.	Stirling .	Sheriff of Stirling, Dumbarton, and Clackmannan.

¹ 8 & 9 Geo. V. c. 65, ss. 37 (1), 43 (13), Schedules VII., IX., Pts. ii. and iii.; S.R. & O., 1918, No. 1311 S./58; Am. S.R. & O., 1922, No. 1178/S. 53; S.R. & O., 1923, No. 361/S. 31.

II. PARLIAMENTARY COUNTIES.

Name of Parliamentary Constituency.	Burgh in which the Place of Election is situated.	Returning Officer.
Aberdeen and Kincardine— Central Division	Aberdeen	Sheriff of Aberdeen, Kincardine, and Banff.
Eastern Division	"	" " "
Kincardine and Western Division.	Stonehaven	" " "
Argyll	Dunoon	Sheriff of Argyll.
Ayr and Bute— Bute and Northern Division	Kilwinning	Sheriff of Ayr.
Kilmarnock Division	Kilmarnock	" "
South Ayrshire Division	Ayr	" "
Banff	Banff	Sheriff of Aberdeen, Kincardine, and Banff.
Berwick and Haddington	Haddington	Sheriff of the Lothians and Peebles.
Caithness and Sutherland	Wick	Sheriff of Caithness, Orkney, and Zetland.
Dumbarton	Dumbarton	Sheriff of Stirling, Dumbarton, and Clackmannan.
Dumfries	Dumfries	Sheriff of Dumfries and Galloway.
Fife— Eastern Division	Cupar	Sheriff of Fife and Kinross.
Western Division	Dunfermline	" " "
Forfar	Dundee	Sheriff of Forfar.
Galloway	Kirkcudbright	Sheriff of Dumfries and Galloway.
Inverness and Ross and Cro- marty— Inverness Division	Inverness	Sheriff of Inverness, Elgin, and Nairn.
Ross and Cromarty Division	Dingwall	Sheriff of Ross, Cromarty, and Sutherland.
Western Isles Division	Stornoway	" " "
Lanark— Bothwell Division	Glasgow	Sheriff of Lanark.
Coatbridge Division	Airdrie	" "
Hamilton Division	Hamilton	" "
Lanark Division	Glasgow	" "
Motherwell Division	Hamilton	" "
Northern Division	Glasgow	" "
Rutherglen Division	"	" "
Linlithgow	Linlithgow	Sheriff of the Lothians and Peebles.
Midlothian and Peebles— Northern Division	Edinburgh	" " "
Peebles and Southern Division	Peebles	" " "
Moray and Nairn	Elgin	Sheriff of Inverness, Elgin, and Nairn.
Orkney and Zetland	Kirkwall	Sheriff of Caithness and Zetland.
Perth and Kinross— Kinross and Western Division	Perth	Sheriff of Perth.
Perth Division	"	" "

II. PARLIAMENTARY COUNTIES (*continued*).

Name of Parliamentary Constituency.	Burgh in which the Place of Election is situated.	Returning Officer.
Renfrew—		
Eastern Division . . .	Paisley . . .	Sheriff of Renfrew and Bute.
Western Division . . .	" . . .	" " " "
Roxburgh and Selkirk . . .	Jedburgh . . .	Sheriff of Roxburgh, Berwick, and Selkirk.
Stirling and Clackmannan—		
Clackmannan and Eastern Division.	Alloa . . .	Sheriff of Stirling, Dumbarton, and Clackmannan.
Western Division . . .	Stirling . . .	" " "

III. UNIVERSITY CONSTITUENCY.¹

Description of Constituency.	Place of Election.	Returning Officer.
The University of St. Andrews, the University of Glasgow, the University of Aberdeen, and the University of Edinburgh.	Place of nomination (<i>i.e.</i> election) to be fixed by Returning Officer.	Vice-Chancellor of the University of Edinburgh.

SECTION 3.—QUALIFICATION OF PARLIAMENTARY VOTERS.

SUBSECTION (1).—*Qualification Prior to 1832.*

447. From 1707 to 1832 the qualifications for electing representatives to the British House of Commons, known as Commissioners, were retained on the same franchises as existed for election to the Scots Parliament prior to the Union.² The county representatives—thirty in number—were elected by the freeholders in each constituency.² To be qualified as a freeholder a person had to be publicly infeft in property or superiority, and in possession of a forty-shilling land of old extent, or where the old extent did not appear, be infeft in land liable in public burdens for His Majesty's supplies for £400 Scots of valued rent. In royal burghs, 1 of the 15 representatives was elected directly by the Lord Provost, Magistrates, and Council of the City of Edinburgh. The remaining 64 royal burghs were divided into 14 constituencies, each returning 1 representative. The Town Council of each burgh in a district chose a delegate. These delegates, being convened, elected the representative for the district.

¹ 8 & 9 Geo. V. c. 64, s. 36 (1); Schedule V., Rules 1 and 4, Schedule IX., Pt. iii.

² 1681, c. 21.

SUBSECTION (2).—*Under the Reform Act, 1832.*

448. The Reform Act, 1832,¹ superseded all the old qualifications under reservation of the personal rights of existing freeholders which have long since been spent. It introduced entirely new qualifications based upon property and occupation.

449. In counties,² the franchise was conferred on (1) owners (joint or several) of any land, houses, feu-duties, or other heritable subjects of the clear yearly value of £10; (2) tenants (joint or several) of land, houses, or other heritable subjects (a) for a period of not less than fifty-seven years, or for the lifetime of the tenant, whether in his personal possession or not, where the tenant's interest after paying rent and any other consideration due by him was not less than £10; (b) for a period of not less than nineteen years, the clear value of the tenant's interest being not less than £50; (c) the tenant in the personal occupancy, the yearly rent being not less than £50; or (d) the tenant having paid a grassum of £300. It was a condition of qualification that owners should have possessed for six months, and tenants for twelve months prior to the last day of July in each year, and have retained their qualification after that date, until the Sheriff proceeded to consider their claims.

450. In burghs,³ the franchise was conferred on occupiers, either as proprietor, tenant, or liferenter of any house, warehouse, counting-house, shop, or other building within the limits of the burgh or town separately or jointly with any other house, shop, or building of the yearly value of £10, provided (a) the occupancy had been for twelve months prior to the last day of July in each year (except in the case of owners of premises of £10 yearly value and upwards); (b) that he had paid prior to 30th July all assessed taxes payable in respect of such premises prior to 6th April then preceding; (c) that he had not been in receipt of parochial relief for twelve calendar months, and (d) that he had resided for six calendar months previous to the last day of July within the burgh or seven miles of it.

SUBSECTION (3).—*Under the Representation of the People (Scotland) Act, 1868.*⁴

451. The 1868 Act, while retaining the existing franchises in a county,⁵ reduced the qualification for an owner to £5 of clear annual value,⁶ and for a tenant, if he should be in actual personal occupancy, to £14 of clear yearly value as appearing in the Valuation Roll,⁷ and continued the conditions as to ownership and occupancy. In burghs⁸ the Act conferred the franchise on every inhabitant occupier as owner or tenant of a dwelling-house within the burgh, and "dwelling-house" was defined

¹ 2 & 3 Will. IV. c. 65.

⁴ 31 & 32 Vict. c. 48.

⁷ Sec. 2.

² Sec. 7.

⁵ Sec. 6 (2).

⁸ Sec. 3.

³ Sec. 11.

⁶ Sec. 5.

to include any part of a house occupied as a separate dwelling, and (in any parish in which poor rates are levied) the occupier of which is separately rated for the relief of the poor either in respect thereof or as an inhabitant of such parish; and residence within the burgh, and not merely within seven miles thereof, was made necessary to qualify as a voter.¹

452. Both with regard to the £14 occupation franchise in counties and the occupation franchise in burghs it was provided that anyone was disqualified who (1) had, during the statutory twelve months, been exempted from payment of poor rates on the ground of inability to pay; (2) had failed timeously to pay the poor rates payable by him;² or (3) had been in receipt of parochial relief.³

453. The Act, as regards burghs, introduced a new franchise known as the lodger franchise⁴ by enacting that the sole tenant and occupant separately as a lodger of lodgings of a clear yearly value (if let unfurnished) of £10 or upwards, who had resided in such lodgings during the twelve months immediately preceding the last day of July in each year, and had claimed to be registered as a voter at the next ensuing registration of voters, should be entitled to be registered.

454. The Act further created the universities constituencies, and provided a separate franchise for them⁵ by enacting that "the chancellor, the members of the University Court, the professors for the time being of each of the universities of Scotland, and also every person whose name is for the time being on the register, made up in terms of the provisions hereinafter set forth, of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university."

SUBSECTION (4).—*Under the Representation of the People Act, 1884.*⁶

455. The 1884 Act created a uniform household franchise and a uniform lodger franchise in counties and burghs, and assimilated the tenant's occupation franchise in the counties to that in the burghs by lowering it from £14 to £10 of clear annual value.⁷

456. The Act further created what is known as the service franchise, which was not a new franchise, but merely an extension of the household franchise. It provided⁸ that when a man himself inhabited any dwelling-house by virtue of any office, service, or employment, and the dwelling-house was not inhabited by any person under whom such man served in such office, service, or employment, he should be deemed "to be an inhabitant occupier of such dwelling-house as a tenant." To render this provision effectual a new definition of "dwelling-house" was substituted for that contained in the 1868 Act, "dwelling-house" being defined⁹ to mean "any house or part of a house occupied as a

¹ Sec. 59.

² Secs. 3, 6.

³ Sec. 60.

⁴ Sec. 4.

⁵ Secs. 37, 38.

⁶ 48 Vict. c. 3.

⁷ Sec. 2.

⁸ Sec. 3.

⁹ Sec. 7 (4).

separate dwelling." This made separate rating for relief of the poor no longer a condition of the household franchise.

SUBSECTION (5).—*Under the Representation of the People Acts, 1918 to 1928.*

457. The Representation of the People Act, 1918,¹ abolished all the prior existing parliamentary franchises. In substitution the Act provided for men three alternative qualifications: (1) The residence qualification; (2) the business premises qualification; and (3) the university qualification. A sweeping change was introduced by the provision for the admission to the parliamentary franchise of every woman if she were thirty years of age and entitled to be registered as a local government elector as defined by the Act, or the wife of a husband entitled to be so registered.

458. Further outstanding features of the Act were (a) the limitation of the qualifying period; (b) permitting absent voters to vote by post or by proxy; (c) fixing all elections in a general election to be held on one and the same day; (d) providing for the returning officer's expenses to be paid by the Treasury; (e) reducing the scale of a candidate's expenses; and (f) prohibiting certain expenses being incurred by unauthorised persons. Between 1918 and 1926 the principal Act was amended and modified by various statutes and by Orders in Council.

459. The franchise was further radically altered by the Representation of the People (Equal Franchise) Act, 1928,² which removed the existing limitations upon women in exercise of the franchise, and assimilated the franchise for men and women in respect of parliamentary and local government elections.

460. The Representation of the People Act, 1918, has been amended by the following statutes:—

1. The Representation of the People (Amendment) Act, 1918.³
2. The Representation of the People (No. 2) Act, 1920.⁴
3. The Representation of the People Act, 1921.⁵
4. The Representation of the People Act, 1922.⁶
5. The Representation of the People (No. 2) Act, 1922.⁷
6. The Representation of the People (Economy Provisions) Act, 1926;⁸ and
7. The Representation of the People (Equal Franchise) Act, 1928;⁹ and by Orders in Council embodied in a reprint of S.R. & O., 1918, No. 1813, known as R.P. 134, incorporating the provisions of all prior Orders so far as not repealed or spent down to and including 7th February 1927, and an Order in Council dated 14th August 1928.¹⁰

These Acts are construed as one Act, and are cited as the Representa-

¹ 8 Geo. V. c. 64.

⁴ 10 & 11 Geo. V. c. 35.

⁷ 12 & 13 Geo. V. c. 41.

⁵ 18 & 19 Geo. V. c. 12.

² 18 & 19 Geo. V. c. 12.

⁵ 11 & 12 Geo. V. c. 34.

⁸ 16 & 17 Geo. V. c. 9.

¹⁰ S.R. & O., 1928, No. 645.

³ 8 & 9 Geo. V. c. 50.

⁶ 12 & 13 Geo. V. c. 12.

tion of the People Acts, 1918 to 1928. These statutes, with the adaptation of the Ballot Act, 1872,¹ and the several statutes dealing with corrupt and illegal practices, have codified practically the whole existing election law.

SECTION 4.—EXISTING PARLIAMENTARY FRANCHISE.

SUBSECTION (1).—*Who may be Registered as Electors.*

461. A person shall be entitled to be registered as a parliamentary elector for a constituency (other than a university constituency) if he or she is of full age and not subject to any legal incapacity, and (a) has the requisite residence qualification; or (b) has the requisite business premises qualification; or (c) is the husband or wife of a person entitled to be so registered in respect of a business premises qualification.² A constituency (other than a university constituency) means any county, burgh, or combination of places returning a member to serve in Parliament and, where a county or burgh is divided for the purpose of parliamentary elections, a division of the county or borough so divided.³

462. The two conditions precedent to the acquisition of any of the alternative qualifications specified are that a person must be (1) of full age, and (2) not subject to any legal incapacity.

463. Full age, at common law, is the age of twenty-one years complete, which is attained the day preceding the twenty-first anniversary of a person's birth.⁴ For the purposes of registration a person's age is taken to be his or her age on the last day of the qualifying period, including that day.

464. Legal incapacity is some quality inherent in a person debarring that person, so long as it exists, from the status of a parliamentary elector, as distinguished from a disqualification through failure to possess the necessary statutory requisites for qualification.⁵ The following persons are legally incapacitated: (1) A peer of the United Kingdom, or of Scotland, or of Ireland,⁶ if not actually elected and serving for a constituency in Great Britain; but not a peeress in her own right;⁷ (2) a person holding any of various offices, which include a salaried Sheriff or Sheriff-Substitute,⁸ but not an Honorary Sheriff-Substitute,⁹ a sheriff-clerk or depute sheriff-clerk for the county in which the election is held,¹⁰ but not as formerly a town-clerk or depute town-clerk, or an

¹ 35 & 36 Vict. c. 33.

² 8 Geo. V. c. 64, s. 1; 18 & 19 Geo. V. c. 12, s. 1.

³ 8 Geo. V. c. 64, s. 241 (1).

⁴ *Anon.*, 1669, 1 Lord Raymond 460; *Fitzhugh v. Dennington*, 1704, 2 Lord Raymond 1096.

⁵ *Stowe v. Jolliffe*, 1874, L.C. 10 C.P. 734, per Lord Coleridge C.J. at p. 750.

⁶ *Earl Beauchamp v. Madresfield*, 1872, L.R. 8 C.P. 245; *Lord Rendlesham v. Haward*, 1873, L.R. 9 C.P. 252.

⁷ 8 Geo. V. c. 64, s. 9 (5).

⁸ Sec. 43 (6).

⁹ *Wright v. Kellie*, 1898, 1 F. 209.

¹⁰ 2 & 3 Will. IV. c. 65, s. 36.

Assessor under the Valuation Acts;¹ (3) a minor; (4) a fatuous or insane person; (5) an alien,² unless he or she has obtained a certificate of naturalisation and taken the oath of allegiance; (6) a person convicted of a corrupt practice or an illegal practice at a parliamentary, municipal, county council, parish council, or education authority election;³ (7) a person who has been twice convicted under the Public Authorities Corrupt Practices Act, 1889, s. 2;⁴ and (8) a person who is reported by an Election Court of being guilty of a corrupt practice or an illegal practice, whether he or she obtains a certificate of indemnity or not.⁵

SUBSECTION (2).—*Residence Qualification.*

465. In order to obtain the requisite residence qualification, one of the alternative methods of acquiring the franchise, a person

- (a) must on the last day of the qualifying period be residing in premises in the constituency;
- (b) must during the whole of the qualifying period have resided in premises in the constituency, or in another constituency within the same parliamentary borough or parliamentary county, or within a parliamentary borough or parliamentary county contiguous to that borough or county or separated from that borough or county by water not exceeding at the nearest point six miles in breadth, measured in the case of tidal water from low-water mark.⁶

(i) *Qualifying Period.*

466. The qualifying period is three months, ending on the fifteenth day of June and including that day.⁷ It is specifically provided that the qualifying period for the purpose of the register of electors to be made in the year 1929 shall end on the fifteenth day of December 1928.⁸ Any time less than the specified period, however short, will disqualify.⁹

(ii) *Naval and Military Voters' Limitation.*

467. In the case of a person who is a naval or military voter, or who has been serving as a member of the naval, military, or air forces of the Crown at any time during the said three months, and has ceased so to serve, one month ending on the day mentioned is substituted for three months as the qualifying period.¹⁰ Under this provision any person specified who at any time after 16th March ceases to be in the

¹ 8 Geo. V. c. 64, s. 43 (6).

² Sec. 9 (3).

³ 53 & 54 Vict. c. 55, s. 3.

⁴ 52 & 53 Vict. c. 69, s. 2.

⁵ 46 & 47 Vict. c. 51, s. 38 (5).

⁶ 7 & 8 Geo. V. c. 64, s. 1 (1); amended by 18 & 19 Geo. V. c. 12, s. 1.

⁷ 7 & 8 Geo. V. c. 64, s. 6; amended by 16 & 17 Geo. V. c. 9, s. 9, Schedule III.

⁸ 18 & 19 Geo. V. c. 112, s. 6 (1) (a).

⁹ *Waddell v. M'Phail*, 1865, 4 M. 130; *Emmerson v. Oliver*, 1905, 8 F. 322.

¹⁰ 7 & 8 Geo. V. c. 64, s. 6; amended by 16 & 17 Geo. V. c. 9, s. 9, Schedule.

service of the Crown will require only to reside in premises or occupy land or premises from 16th May to 15th June in order to complete the qualifying period.

(iii) *Swallow Voters.*

468. To prevent the creation of spurious, or what are known as "swallow" voters, and to ensure that the residence on the last day is *bona fide*, a person is not entitled to be registered as a parliamentary elector for a constituency in respect of a residence qualification, though that person may have been residing in the constituency on the last day of the qualifying period, if that person commenced to reside in the constituency within thirty days before the end of the qualifying period, and ceased to reside within thirty days after the commencement of the residence.¹

(iv) *What constitutes Residence.*

469. Residence is the sole qualification. It is sufficient that a person resides in the constituency for the qualifying period irrespective of the nature of the residence or of any question of tenancy, or value, or the levying or payment of rent or rates. There is no question of title or estate, and so a person merely from living in his parents' house, or even a trespasser, cottar, or squatter may obtain the residence qualification.²

470. The expression "residence" is nowhere defined, and with cognate expressions is to be interpreted according to general principles.³ The word "residence" has a variety of meanings according to the subject-matter of its use.⁴ Assistance can be derived only from the interpretation given to the expression as used in the prior statutes dealing with the franchise, and in the construction of the "continuous residence" provisions of the Poor Law Act. Residence is of two kinds: (a) actual residence, and (b) constructive residence. In every case it is a question of fact.

471. Actual residence implies home. The place where a man sleeps and has his home is the place where he resides.⁵ "There is no strict or definite rule for ascertaining what is inhabitance or residence. The words have nearly the same meaning. Sleeping once or twice in a place would not constitute inhabitance. There is no precise line to be drawn. It is always, if the inhabitancy is *bona fide*, a question of more or less. The question is whether there has been such a degree of inhabitance as to be in substance and in common sense a residence. Whether when a man leaves one residence to go elsewhere to transact real business he has two or more residences depends on quantity and

¹ 7 & 8 Geo. V. s. 7 (3).

² *Beal v. Ford*, 1877, 3 C.P.D. 73.

³ 11 & 12 Geo. V. c. 34, s. 3 (1).

⁴ *Lloyd v. Solicitor of Inland Revenue*, 1884, 11 R. 687; *Blair v. Hunters*, 1888, 15 R. 1094.

⁵ *Barlow v. Smith*, 1892, Fox & S. Reg. 293, at p. 297.

amount. It is a pure question of fact.”¹ “It is quite clearly settled by a series of cases that in order to constitute residence for the purpose of this Act (the Reform Act, 1832, s. 13) it is not necessary that a man should have resided continuously during every day or every week of the six months, and that being decided it appears to me to be merely a question of circumstances in each particular case whether the condition of residence can be held to have been satisfied or not. I am of opinion, in accordance with previous decisions, that the circumstances here were sufficient to constitute residence. During by far the greater part of the period the appellant resided continuously in this house; it was a house built and occupied as a residence for himself and his family, and for no other purpose. From the time he left it till he returned he was in a position to return at any moment he pleased, and he intended to return and carried out his intention.”² On the other hand, the claim of a person whose principal residence was in Glasgow, where he resided, and who was tenant of a cottage in Brodick, which he had periodically visited but had not resided in for a year, was refused on the ground that he had not inhabited, and that his visits to Bute seemed not to be in any proper sense an inhabiting, but visits incidental to the residence which he had in Glasgow.³

(v) *Constructive Residence.*

472. Constructive residence has been resumed thus: “When a party is temporarily absent from the house in which he is in use to reside in the pursuit of his business or ordinary calling, but with the intention of returning to that house as soon as he conveniently can, such temporary absence is not sufficient in law to break the continuity of his residence either under the ‘continuous residence’ provisions of the seventy-sixth section of the Poor Law Act, or under the ‘personal occupancy’ clauses of the Acts which regulate the qualification of voters. In cases of both descriptions the party who has been temporarily absent will be held to have been resident constructively for the requisite period in the house occupied during his absence by his family or his servants as the case may be. And in the view which has been taken on the questions of constructive residence in Scotland, it has never been held to be necessary that there should be some express provision in an Act to authorise the Court to lay down the rules they have done. They seem, on the contrary, to have considered themselves entitled to construe the provisions of the Acts in order to ascertain whether on a fair construction those provisions admitted of the rule being applied in the case where a party during a temporary absence from his home

¹ *Reg. v. Mayor of Exeter (Wescomb's case)*, 1868, L.R. 4 Q.B. 110, per Blackburn J. at p. 113; see *Kennard v. Allan*, 1879, 7 R. 1.

² *Sim v. Galt*, 1892, 20 R. 84, per Lord Kinnear at p. 86; see *Urquhart v. Adam*, 1904, 7 F. 157.

³ *Stewart v. M'Fadzean*, 1890, 18 R. 349.

left his family there till his return. So construing the Acts, the conclusion they came to was that the absent party was to be considered as being constructively resident in the house where he had left his family, which was in reality his home, and that the rule applied in cases of compulsory as well as of voluntary absence.”¹

473. It has been held that actual inhabitancy during every one of the three hundred and sixty-five days making up the qualifying period was not necessary, and that it was sufficient if the claimant could make out a constructive residence.² But in order to make out a constructive inhabitancy there must be an intention of returning after a temporary absence, and a power of returning at any time without breach of any legal obligation.

474. A definition of residence has been given by Mr. Elliott,³ which frequently has had judicial approval.⁴ He says: “In order to constitute residence, a party must possess at the least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party’s pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there.”

475. These general principles are subject to two statutory exceptions in their application:—

1. Residence in a house, or the occupation of a house, shall not be deemed to be interrupted by reason only of permission being given, by letting or otherwise, for the occupation of the house as a furnished house by some other person for part of the qualifying period not exceeding two months in the whole, or where the occupation of the person giving the permission commenced more than six months before the last day of the qualifying period for not more than four months in the whole during that period of six months, or by reason only of notice to quit being served and possession demanded by the landlord of the house.⁵ The effect of this provision, it is submitted, is that a person whose occupation of premises commenced more than six months before the fifteenth day of June may be absent therefrom during the whole of the qualifying period, and the person residing in the house during such absence may also obtain the residence qualification.

2. The residence of a person in any premises shall not be deemed to have been interrupted for the purposes of the Representation of the People Acts, 1918 to 1920, by reason only of the fact that that person

¹ *Watt v. M'Guire*, 1888, 16 R. 263, per Lord Mure at pp. 267, 268.

² *Atkinson v. Collard*, 1885, 16 Q.B.D. 254;

³ Elliott on Registration, 2nd ed., p. 204.

⁴ *Powell v. Guest*, 1864, 11 C.B. (N.S.) 69, per Esher C.J. at p. 70.

⁵ 8 Geo. V. c. 64, s. 7 (2); amended by 16 & 17 Geo. V. c. 9, s. 9 (2) (b), Schedule III.

has been absent from the premises during part of the qualifying period not exceeding two months at any one time or, if the residence commenced more than six months before the last day of the qualifying period, during a part of those six months, not exceeding four months at any one time, in the performance of any duty arising from or incidental to any office, service, or employment held or undertaken by him.¹

476. A person who is an inmate or patient in any prison, lunatic asylum, workhouse, poorhouse, or any other similar institution, shall not by reason thereof be treated as resident therein for any purpose of the franchise.²

477. Applying the general principles indicated, subject to the limitations stated, the effect is:

- (1) The residence must be personal, the determining factor being that a person cannot inhabit except personally, although he may occupy personally without inhabiting.
- (2) The residence need not be actual, but may be constructive.
- (3) The residence, whatever its nature, must be continuous, and any interruption, other than allowed by statute, during the qualifying period will disqualify.
- (4) During absence, however caused, there must exist the *animus revertendi*, any abandonment of which once made cannot be recalled.

SUBSECTION (3).—*Business Premises Qualification.*

(i) *Definition.*

478. To obtain the business premises qualification, another method of acquiring the franchise, a person

- (a) must on the last day of the qualifying period be occupying business premises in the constituency; and
- (b) must during the whole of the qualifying period have occupied business premises in the constituency, or in another constituency within the same parliamentary borough or parliamentary county, or within a parliamentary borough or parliamentary county contiguous to that borough or county, or separated therefrom by water not exceeding, at the nearest point, six miles in breadth, measured in the case of tidal water from low-water mark.³

The expression "business premises" is defined as "land or other premises of the yearly value of not less than £10, occupied for the purpose of the business, profession, or trade of the person to be registered";⁴ and the yearly value is taken to be the value appearing in the Valuation Roll, when the subjects are separately valued in that Roll, and in any other

¹ 11 & 12 Geo. V. c. 34, s. 1; amended by 16 & 17 Geo. V. c. 9, s. 9 (2) (b), Schedule III.

² 8 Geo. V. c. 64, s. 41 (5).

³ *Ibid.*, s. 2; amended by 18 & 19 Geo. V. c. 12, s. 1 (2).

⁴ Sec. 1 (3).

case, the value which would, in the opinion of the registration officer, be entered therein if they were so valued.¹

(ii) *Qualifying Period.*

479. The qualifying period is occupancy under like conditions as for the residence qualification, except that the additional obligation imposed upon a person commencing to reside in a constituency within thirty days before the end of the qualifying period does not apply even in the case of successive occupancy.

(iii) *What constitutes Occupancy.*

480. A person to be registered must, in some capacity, have exercised the actual rights of an owner in possession, and have been the user for the purpose of his or her business, profession, or trade, of land or premises for the requisite period and of the specified value.² The occupation is not limited as in prior statutes to an owner or tenant. The definition, it is thought, is sufficiently wide to include a person who is in the actual control and management of a business, profession, or trade, *e.g.* the manager of a multiple shop.

481. The occupation must be continuous and actual of land or premises used for the purpose of the business, profession, or trade.³ There may be occupation of different premises in succession, but there must be no interval of time between the loss of the one subject and the acquisition of the other subject. Occupation of land or premises equipped, but not used, for one of the specified purposes is not sufficient to qualify.⁴ A temporary interruption in the occupation of the premises owing to alterations thereon may or may not disqualify. A distinction is drawn between structural alterations inconsistent with occupancy and mere internal improvements.⁵ Where the premises consisted of a studio and garden, and the studio was burned down but immediately rebuilt, it was held that there had been no interruption to disqualify.⁶

482. What is a business, profession, or trade is a question of fact to be determined in accordance with the particular circumstances in each case. The word "business" has a more extensive signification than "trade,"⁷ but it has never been doubted that farming was a business, though it could not properly be called a "trade," since the latter has the technical meaning of buying and selling. It is more difficult to determine whether a particular calling is a profession.⁸

483. While the occupation must be continuous, it does not require

¹ 8 Geo. V. c. 64, s. 43 (2).

² *Cook v. Humber*, 1862, 11 C.B. (N.S.) 33.

³ *Adair v. Kay*, 1874, 2 R. 9; *Paterson v. Millar*, 1878, 6 R. 22.

⁴ *Johnston v. Guild*, 1884, 12 R. 42.

⁵ *Stewart v. Johnston*, 1868, 7 M. 328.

⁶ *Hunter v. Ballantine*, 1879, 7 R. 2; *Whitley v. M'Cleane*, 1866, 14 L.T. 899.

⁷ *Harris v. Amery*, 1865, 35 L.J. C.P. 89.

⁸ *Crook v. Inland Revenue*, 1920 S.C. 721.

to be exclusively personal, and may be constructive.¹ The statutory exceptions from interruption of occupancy of the premises arising from (a) letting—but only if the premises are a house, and (b) absence in the performance of any duty arising from or incidental to any office, service, or employment, apply.

(iv) *Joint Occupiers.*

484. Where land or premises are in the joint occupation of two or more persons, each of the joint occupiers shall be treated as occupying the premises subject to the following: (a) The aggregate yearly value of the premises must be not less than the amount produced by multiplying ten pounds by the number of the joint occupiers; and (b) not more than two joint owners shall be entitled to be registered in respect of the same land or premises, unless they are *bona fide* engaged as partners carrying on their profession, trade, or business in the same land or premises.² Occupation by one of several joint owners or tenants on his or her own behalf, and on behalf of the other joint owners or tenants, would constructively be occupation to entitle all of them to be registered.³

485. Shareholders in joint-stock companies, whether incorporated or unincorporated, which own heritage, have been held not entitled to be registered in respect of their shares as joint owners of such, inasmuch as the property of the company is merged in a common stock to the exclusion of any right of joint ownership.⁴ On the other hand, the members of a building society, not being a joint-stock company, which possessed heritage vested in the society for behoof of its members, were held entitled to be treated as joint proprietors of the society's heritable property, and to be qualified to be registered as joint owners.⁵ Partners in an illegal unincorporated company have been held disqualified as such partners from acquiring a qualification as joint tenants of heritage leased by the company.⁶

486. Where the number of joint occupiers is in excess of the persons entitled to be registered on a division of the annual value, there is no rule for determining the order of preference of the persons to be registered. Failing agreement, it has been suggested judicially that the choice should be made by lot.⁵

SUBSECTION (4).—*Right of Husband or Wife of Person with Business Premises Qualification.*

487. Under the limited parliamentary female franchise a woman was entitled to be registered as a parliamentary elector for a con-

¹ *Weatherhead v. Moffat*, 1878, 6 R. 20; *Adamson v. Smith*, 1879, 17 S.L.R. 158; *Lunan v. Allan*, 1880, 8 R. 13; *Whitelaw v. M'Gowan*, 1905, 8 F. 332.

² 8 Geo. V. c. 64, s. 7 (1) (a) (c).

³ *Jones v. Pritchard*, 1891, 1 Fox & S. Reg. 259; *Niven v. Stewart*, 1908 S.C. 290.

⁴ *Dove v. Young*, 1868, 7 M. 304; *Arthur v. Baird*, 1868, 7 M. 308.

⁵ *Leiper v. Hamilton*, 1868, 7 M. 303.

⁶ *Harris v. Amery*, 1865, L.R. 1 C.P. 148.

stituency if she were the wife of a husband entitled to be registered as a local government elector in respect of the occupation in that constituency of land or premises (not being a dwelling-house) of a yearly value of not less than £5, or of a dwelling-house.¹ A wife under this provision acquired a right to the franchise in respect of the qualifications her husband possessed for both the residence qualification and the business qualification. As occupancy is the sole requirement a husband and wife acquire the residence qualification franchise in their individual right.

488. The derivative right a woman formerly possessed to be registered for a business premises qualification possessed by her husband is preserved, and a reciprocal right is conferred upon the husband of a wife with a similar right.² Under this provision the husband or wife of a person entitled to be registered as a parliamentary elector for a constituency in respect of a business premises qualification is entitled as the husband or wife, as the case may be, of that person, to be registered as an elector for that constituency in respect of such business premises qualification. The claimant must be of full age and not subject to any legal disability. The husband or wife does not require to be registered; it is sufficient for the claimant to show that he or she is possessed of a right to be registered in respect of a business premises qualification.

SUBSECTION (5).—*Special Provisions for Persons on
War Service.*

489. Special provisions are made for persons serving as members of any of the naval, military, or air forces of the Crown as follows: A person designed "a naval or military voter" is entitled to be registered as a parliamentary elector for any constituency for which he or she would have had the necessary qualification but for the service which brings him or her within these provisions;³ the right to be registered is an addition to any other right to be registered, but a naval or military voter is not entitled to be registered for a constituency in respect of an actual residence qualification, except on making a claim for the purpose accompanied by a declaration in the prescribed form, that he or she has taken reasonable steps to prevent his or her being registered as a naval or military voter for any other constituency.⁴ The statement of any person, made in the prescribed form and verified in the prescribed manner, that he or she would have had the necessary qualification but for his or her naval or military service is sufficient if there is no evidence to the contrary.⁵

490. This provision applies to any person who is of full age and is not subject to any legal incapacity, and who

¹ 8 & 9 Geo. V. c. 64, s. 43 (4), repealed.

² Sec. 1 (1) (c), as amended.

³ 8 & 9 Geo. V. c. 64, s. 5 (1).

⁴ R.P. 134, Rule 1; Schedules II., III.

⁵ Sec. 5 (2); R.P. 134, Rule 1 (3); Schedule II., head V.

- (i) is serving on full pay as a member of any of the naval, military, or air forces of the Crown; or
- (ii) is abroad or afloat in connection with any war in which His Majesty is engaged, and is
 - (a) in service of a naval or military character for which payment is made out of moneys provided by Parliament, or (where the person serving was at the commencement of his or her service resident in the United Kingdom) out of the public funds of any part of His Majesty's dominions, or in service as a merchant seaman, pilot, or fisherman, including the master of a merchant ship or fishing-boat and an apprentice on such ship or boat; or
 - (b) serving in any work of the British Red Cross Society, or the Order of St John of Jerusalem in England, or any other body with a similar object; or
 - (c) serving in any other work recognised by the Admiralty, Army Council, or Air Council as work of national importance in connection with the War.

The necessary qualifications which a person, but for his or her naval or military service, would have had are (a) the requisite residence qualification; or (b) the requisite business premises qualification in his or her constituency; or (c) the requisite qualification for a university constituency.

491. Naval or military voters who come under this provision are of two classes. The persons included under (i) are qualified irrespective of whether a state of peace or war exists, or whether they are abroad or afloat. The persons included under (ii) are qualified only if they are abroad or afloat in connection with a war existing at the time of their claim. "Abroad" means outwith the United Kingdom, and the Irish Free State must now be so regarded. The expression "afloat" and expressions relating to service afloat in connection with naval and military voters are to be interpreted in accordance with rules made by the Admiralty.¹ The Admiralty have interpreted "afloat" in connection with the "war" to mean "any person employed under Admiralty directions who is living on board of any of His Majesty's ships, or any ship or hulk provided for his accommodation by the Admiralty."

SUBSECTION (6).—*University Qualification.*

492. A person shall be entitled to be registered as a parliamentary elector for the Scottish Universities constituency if he or she is of full age, and not subject to any legal incapacity; and

- (a) has received a degree (other than an honorary degree) at any university forming part of the constituency; or

¹ 8 & 9 Geo. V. c. 64, s. 41 (9).

- (b) is qualified under s. 27 of the Representation of the People (Scotland) Act, 1868; or
- (c) if a woman, has been admitted to and passed the final examination and kept, under the conditions required of women by the university, the period of residence necessary for a man to obtain a degree at any university forming, or forming part of, a university constituency which did not at the time the examination was passed admit women to degrees.¹

The Representation of the People (Scotland) Act, 1868,² enacts that “the Chancellor, the members of the University Court and the professors for the time being of each of the Universities of Scotland, and also every person whose name is for the time being on the register . . . of the general council of such University, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such University. . . .”

SECTION 5.—RIGHT TO VOTE AT A PARLIAMENTARY ELECTION.

493. Every person registered as a parliamentary elector for any constituency shall, while so registered (and in the case of a woman notwithstanding sex or marriage), be entitled to vote at an election of a member to serve in Parliament for that constituency, but a person shall not vote at a general election for more than one constituency for which he or she is registered by virtue of a residence qualification, or for more than one constituency for which he or she is registered by virtue of other qualifications of any kind.³

494. Under this provision a person is free to acquire a parliamentary qualification to vote in as many constituencies as the person pleases, but his or her exercise of the use thereof is limited. At a general election only a person possessed of a residence qualification has two votes. A person so qualified may vote in respect of—

- (1) his or her residence qualification, and
- (2) one other qualification, either (a) business premises, or (b) a university.

A person not possessing a residence qualification has only one vote in respect of either (a) a business premises, or (b) a university qualification. At a by-election a person may vote once in any constituency in respect of any qualification for which he or she is registered.

SECTION 6.—LOCAL GOVERNMENT FRANCHISE.

SUBSECTION (1).—*Qualification of Voter.*

495. A person who is of full age and not subject to any legal incapacity shall be entitled to be registered as a local government elector

¹ 8 & 9 Geo. V. c. 64, s. 2; 18 & 19 Geo. V. c. 12, s. 1.

² 31 & 32 Vict. c. 48, s. 27.

³ 8 & 9 Geo. V. c. 64, s. 8, as amended by 18 & 19 Geo. V. c. 12, s. 4.

for a local government electoral area if he or she is, on the last day of the qualifying period, and has been during the whole of that period—

- (i) the owner of lands and heritages within the area of the yearly value of £10 . . . ; or
- (ii) the occupier as tenant of lands and heritages within the area of the yearly value of £10 . . . ; or
- (iii) the inhabitant occupier as owner or tenant of a dwelling-house within the area; or
- (iv) the occupier of lodgings within the area of the yearly value, if let unfurnished, of not less than £10; or
- (v) the inhabitant occupier by virtue of any office, service, or employment of a dwelling-house within the area which is not inhabited by the person in whose service he or she is in such office, service, or employment.¹

SUBSECTION (2).—*Owner or Occupying Tenant.*

496. The ownership or occupation in immediate succession of different lands and heritages, dwelling-houses, or lodgings, as the case may be, in the same parliamentary county or the same parliamentary borough, shall have the like effect in qualifying a person to be registered as a local government elector for a local government electoral area therein respectively, as the continued ownership or occupation of the same lands and heritages, dwelling-houses, or lodgings within that area.² The husband or wife of a person entitled to be registered as a local government elector for a local government electoral area in pursuance of the foregoing provisions in respect of premises in which both the person so entitled and the husband or wife, as the case may be, reside, shall, if he or she is of full age and not subject to any legal incapacity, be entitled to be so registered for that area, and for the purpose of this provision a naval or military voter who is registered in respect of a residence qualification which he or she would have had but for his or her service, shall be deemed to be resident in accordance with that qualification.³ In this section “owner” shall include heir of entail in possession, liferenter, and beneficiary entitled under any trust to the rents and profits of land and heritages, and shall not include the feuar of lands and heritages subject to a liferent, nor tutor, curator, judicial factor nor commissioner; “lands and heritages” has the same meaning as in the Valuation Acts, and “dwelling-house” means any part of a house occupied as a separate dwelling. The expression “local government electoral area” means the area for which any county council, parish council, or education authority is elected.⁴

497. The right of the husband or wife of a person entitled to be registered as a local government voter is in respect of premises in which the person so entitled and the husband or wife reside. There is no

¹ 18 & 19 Geo. V. c. 5, s. 7, substituted for 8 & 9 Geo. V. c. 64, s. 43 (3).

² *Ibid.*, s. 7 (b).

³ *Ibid.*, s. 7 (c).

⁴ *Ibid.*, s. 43 (1) (b).

reference to a qualifying period, and the husband or wife, as the case may be, of a person who is entitled to be on the register in respect of premises in which they both reside will be qualified to be registered, provided he or she is of full age and subject to no legal incapacity.¹ The provision regarding naval and military voters is made to overcome the inability of such persons to acquire a residence qualification to entitle them to be registered as local government voters, the special provision for such persons being registered under s. 5 of the Act being limited to the parliamentary franchise.

498. It is a condition precedent to the acquisition of any of the alternative franchises that the person (*a*) is of full age and not subject to any legal incapacity, and (*b*) has on the last day of the qualifying period been possessed of the qualification claimed under. The qualifying period is as for the parliamentary franchise. Acquisition of the franchise under either (i) or (ii) is dependent upon the owner or tenant possessing lands and heritages of the yearly value of £10.

499. Under the prior statutes an owner established his claim if he satisfied the Court that he was in fact proprietor of the subjects upon which his claim was founded, irrespective of the state of his title. The definition of owner in the statute is limited to declaring the inclusion or exclusion of certain specified classes of persons thereunder, without derogating further from the recognised and established interpretation of the expression.² There is no definition of a tenant in the statute. Tenancy may be proved by writing or by parole. Where a written lease exists it has been held that it must be produced, and that the fact of tenancy cannot be proved *aliunde*.³ But parole evidence along with the fact of occupancy has been held sufficient to constitute a lease.⁴

500. Where lands and heritages are in the joint ownership of two or more persons, or in the joint occupation as tenants of two or more persons, and the aggregate yearly value of the lands and heritages is not less than the amount produced by multiplying £10 by the number of the joint owners or joint occupiers, each of the joint owners or joint occupiers shall be treated as owning or occupying lands and heritages of the yearly value of £10 each.⁵ There is no condition imposed upon joint occupiers regarding the purpose of their joint occupation as is attached to joint occupiers under the parliamentary business premises qualification.

SUBSECTION (3).—*Inhabitant Occupier.*

501. This franchise is limited to the inhabitant occupier as owner or tenant of a dwelling-house. The two conditions which have to be satisfied are, that the person as owner or tenant (*a*) has had a right of possession, and (*b*) has exercised that right by possessing a dwelling-house during the qualifying period. Inhabitant occupancy

¹ *Crawford v. Registration Officer of Edinburgh*, 1923, S.L.T. (Sh. Ct.) 1.

² Sec. 43 (3) (*d*).

⁴ *Skeete v. Allan*, 1879, 7 R. 15.

³ *Tulloch and Ors.*, 1863, 1 M. 312 (*Russell*).

⁵ Sec. 43 (*a*) (*i.*), (*ii.*).

and residence are practically identical, and the requirements for the acquisition of the parliamentary residence qualification will apply equally. Under the former statutes it was held that a tenant of a house does not cease to retain the personal occupancy of rooms therein by letting them as furnished lodgings or by receiving boarders.¹

502. It is to be observed that successive ownership or occupation is limited to the same parliamentary county or parliamentary borough, and does not include a contiguous parliamentary county or parliamentary borough as in the parliamentary franchise.

SUBSECTION (4).—*Lodger.*

503. This qualification is somewhat different from other franchises. A lodger is the inhabitant occupier as tenant of a part of a dwelling of which on payment of rent he has the use to the exclusion of the occupier of the whole dwelling-house. The distinction between a lodger and a tenant is that a lodger's title to occupation of his lodgings is dependent upon a personal contract between him and his landlord, in contrast with an ordinary tenant who acquires a direct real right in the subject of possession. Neither the 1868 Act which introduced, nor the 1884 Act which extended, the lodger franchise defines the term "lodgings." In the 1918 Act, in the section dealing with the lodger franchise for women—now repealed—the word "tenant" was defined to "include a person who occupies a room or rooms as a lodger only, where such rooms are let to him or her in an unfurnished state."² The term has not been the subject of definite judicial decision, but the view has been expressed that "there is involved in the term lodger that a man must lodge in the house of another and lodge with him."³ It is no longer a condition precedent to the acquisition of the franchise that a claim should be made annually. If a claim is made, it must be in the statutory form. The lodgings must be of the yearly value, if let unfurnished, of not less than £10.

504. When lodgings are in the joint occupation of not more than two persons and the aggregate yearly value of the lodgings is not less than £20, each of the joint lodgers shall be treated as occupying lodgings of the yearly value of not less than £10. Joint occupancy is limited to two occupiers.⁴ The value of the lodgings is a question of fact, and may be proved in any competent way. Their value if let unfurnished is the criterion. Where a person is sole tenant, the right to be registered of a husband or wife as the case may be residing with her or him is undoubted. A difficulty may, however, arise where the lodgings are in joint occupation, and both the joint tenants are married persons, with their respective husbands or wives residing with them. The result might be that four persons might be admitted to the local government

¹ *Thomas v. Panton*, 1873, 1 R. 17.

² Sec. 43 (4) (b) (ii).

³ *Bradley v. Baylis*, 1881, 8 Q.B.D. 195, per Cotton L.J. at p. 211.

⁴ Sec. 43 (a) (iv).

franchise. It is thought that this is the proper interpretation of the statute, which is the more probable since the four persons would all be entitled to be registered in respect of the parliamentary residence qualification.

505. Occupation must be under a contract of location, express or implied, of lodgings of the statutory value.¹ Sons living in family with their parents and occupying rooms of which they have the exclusive use and for which they pay rent either in money or money's worth to the requisite value are qualified;² but the claim of a son who was allowed by his father the sole use of two rooms without contract or payment of rent was rejected.³ And a son paying his mother rent for the exclusive use of a bedroom and the joint use with her of other rooms was held disqualified in respect that the value of the bedroom of which he was the sole tenant taken alone was not of the requisite value.⁴ A person who obtains his lodgings in part satisfaction of his remuneration under a contract is qualified;⁵ but a member of a voluntary association or brotherhood devoted to teaching, not paid for his services but provided with board, lodging, clothing, and everything necessary for his maintenance, was held not qualified as occupier of a bedroom in a college belonging to the brotherhood in the absence of any contract.⁶

506. What is sufficient occupancy is a question of circumstances.⁷ It does not require actual personal occupation throughout the whole qualifying period.⁸ The statutory exceptions from interruption of the qualifying period do not apply. The exclusive occupation of the lodgings is subject to reasonable interpretation. A son who paid for and had the sole right to occupy a bedroom in his father's house was held not to be disqualified by the fact of having occasionally allowed a brother *ex gratia* to sleep with him during the qualifying period.⁹

SUBSECTION (5).—*Service Franchise.*

507. In order to acquire the service franchise which is not an additional franchise but merely an extension of the inhabitant occupant franchise introduced first under the Representation of the People Act, 1885—

- (a) the person must be the inhabitant occupier of a dwelling-house;
- (b) the person must occupy the dwelling-house by virtue of an office, service, or employment; and
- (c) the house in right of which the person is an inhabitant occupant

¹ *O'Connell v. Blacklock*, 1912 S.C. 640; *Brown v. Martins*, 1885, 13 R. 159.

² *Macdonald v. Dickson*, 1888, 16 R. 143.

³ *Gray v. Deuchar*, 1890, 18 R. 341; *Green v. Donaldson*, 1901, 4 F. 245; *Barr v. Ireland*, 1904, 7 F. 153.

⁴ *Doyle v. Craig*, 1911 S.C. 493.

⁵ *O'Connell v. Blacklock*, *supra*.

⁶ *Monyhan*, 1894, 22 R. 195.

⁷ *Miller v. Bruce*, 1899, 2 F. 265.

⁸ *Falconer v. Dunlop*, 1890, 18 R. 342; *Malcolm v. Browne*, 1894, 22 R. 188.

⁹ *Milne v. Douglas*, 1912 S.C. 635.

must not be inhabited by the person in whose service he is in such office, service, or employment.

The dwelling-house must be inhabited to the same extent and for the same period as is necessary to confer the ordinary inhabitant occupation qualification.¹

508. To inhabit a dwelling-house by virtue of his office, service, or employment means that because of his service a man has the right to occupy certain premises. So a son who worked as a farm servant on his father's farm but without any contract of service, took his meals in family with his father, received from him what money he required from time to time, and had the exclusive use, rent free, of a room in a cottage on the farm, which was occupied by his grandmother, who paid no rent to the father, was held not entitled to be registered as a voter under the service franchise as there was no proof that the occupancy was connected with the service.² A miner who occupied a dwelling-house by virtue of his contract of employment as a miner, having gone out on strike, and a decree of ejection having been obtained but not enforced against him, was held disqualified in respect he was not in occupation by virtue of any right.³

509. The condition that "the dwelling-house is not inhabited by the person [employer] in whose service he [the employee] is in such office, service, or employment" has to be considered. These words, although similar, are not identical with the corresponding words of s. 3 of the 1885 Act, which are: "The dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment." There have been conflicting decisions as to whether the words "any person under whom" are limited to the person from whom by contract the claimant has a right to inhabit or include any person to whom the claimant owes obedience under the conditions of his office, service, or employment.⁴ It is thought that the words "the person" can mean and include only the person from whom the servants' right to inhabit is derived. In *Shortt v. Wright*, where the respondent contended that an assistant medical attendant was a person under whom an attendant in an asylum served in consequence of having to obey his orders, Lord Mackenzie said: "The question is whether in this case the dwelling-house, of which the claimant occupies a part, is also inhabited by a person under whom the claimant 'serves' in the sense of s. 3. If the question were now arising for the first time one can see that there would be a good deal of force in the contention urged on behalf of the respondent in this case. One reason is that it is not one person but a plurality of persons who are pointed at by this section, because the words are not 'inhabited by the person' under

¹ *Urguhart v. Adam*, 1904, 7 F. 157; *Larcombe v. Simey*, [1907] 1 K.B. 139.

² *Aitchison v. Lothian*, 1890, 18 R. 337.

³ *Strachan v. Binnie*, 1888, 15 R. 308.

⁴ *Ballingal v. Menzies*, 1886, 14 R. 127; *Falconer v. M'Guffie*, 1891, 19 R. 295; *Cruise v. Annan*, 1892, 20 R. 79; *Shortt v. Wright*, 1911 S.C. 489.

whom the voter serves, but 'inhabited by *any* person' under whom he serves." These observations appear to support the view expressed.

SUBSECTION (6).—*Limitation of Right to Vote.*

510. A person registered as a local government elector for any local government electoral area shall, while so registered (and in the case of a woman notwithstanding sex or marriage), be entitled to vote at a local government election for that area; but where for the purposes of election any such area is divided into more than one ward or electoral division by whatever name called, a person shall not be entitled to vote for more than one such ward or electoral division. Notwithstanding anything in this provision a person may be registered for more than one such ward or division of a local government electoral area (not being a municipal borough), and may vote in any such ward or division for which he or she is registered at an election to fill a casual vacancy.

PART II.—REGISTRATION OF VOTERS.

SECTION 1.—INTRODUCTORY.

511. Prior to 1918 the Valuation Roll, which is annually made up under the provisions of the Lands Valuation Acts, was the basis of the Register of Voters. The Assessor who made up the Valuation Roll also annually prepared the Register of Voters. Lists of all persons entitled to vote prepared by the Assessor were published and, with objections to any names included therein and claims by parties omitted to be added thereto, were considered at Registration Appeal Courts held by the Sheriff of the county for the revision of these lists. On completing his revision of the lists the Sheriff delivered to the town-clerk in burghs and to the sheriff-clerk in counties the List of Voters as revised. These lists were then printed, and on being authenticated by the Sheriff became the Register of Voters. Under the 1918 Act the Register of Voters is prepared and made up by the Registration Officer. The Sheriff has ceased to have any duty in regard to the preparation or authentication of the register. The Valuation Roll is no longer the basis of the Register of Voters.

SECTION 2.—REGISTRATION AREA.

512. Each burgh, the town council whereof was entitled, under the law in force on 6th February 1918, to appoint an Assessor for the purpose of parliamentary registration, and each county (exclusive of every such burgh), or, where any county is divided for the purpose of parliamentary elections, each part of the county (with the like exclusion) which lies within a parliamentary division, is a registration area.¹

¹ Sec. 43 (8).

SECTION 3.—REGISTRATION OFFICER.

513. The Assessor of the burgh or county under the Valuation Acts, or where there are two or more Assessors, one of them appointed for the purpose of parliamentary registration by the town or county council, as the case may be, is the registration officer of that area, and all other Assessors (if any) in the area are, for the purpose of the registration of parliamentary and local government electors, subject to the instructions of the registration officer, and bound to act on such instructions. An officer of Inland Revenue cannot be appointed, or if appointed prior to 1918, cannot continue to act as Assessor for any burgh or county under the Valuation Acts without the consent of the Treasury.¹

SECTION 4.—REGISTER OF VOTERS.

SUBSECTION (1).—*When made up.*

514. One register of electors is prepared in every year, which is made up for the qualifying period ending on the 15th day of June. The register comes into force on the commencement of the 15th day of October and remains in force until the 15th day of October in the following year.² If for any reason the registration officer fails to compile a fresh register for his area, or any part of his area, the register in force at the time when the fresh register should have come into force continues to operate as the register for the area or part of an area in regard to which default has been made.³

SUBSECTION (2).—*Registration Officer's Duties.*

515. A general duty is imposed upon the registration officer to compile the register, and to place or cause to be placed on the register, in accordance with the rules in the First Schedule to the principal Act, the names of those entitled to vote as parliamentary electors or local government electors in his registration area, and to comply with any general or special directions which may be given by the Secretary of State for Scotland with regard to the arrangements to be made by the registration officer for carrying out his duties as to registration.⁴ If a registration officer refuses, neglects, or fails without reasonable cause to perform any of his duties in connection with registration, he shall be liable on summary conviction to a fine not exceeding £100.

SUBSECTION (3).—*Form of Register.*

516. The register is framed in separate parts for each registration unit in the registration area.⁵ The registration unit is the parish,

¹ Sec. 43 (8).

² Sec. 11 (1) (2); amd. 12 & 13 Geo. V. c. 12, s. 1, Schedule II.; 16 & 17 Geo. V. c. 9, s. 1, Schedule III.

³ Sec. 11 (3).

⁴ Sec. 13 (1).

⁵ Schedule I., Rule 1.

where the parish is wholly contained in one voting area, and where a parish is contained in more than one voting area, is each part of the parish contained in a separate voting area.¹ The expression "voting area" means "any polling district, electoral division, borough, county district other than a borough, and any ward of a borough, county district, or parish, and any other area for which a separate election at which the register is to be used is held."

517. The register shall, as respects each registration unit, contain the names of those who are entitled to vote as parliamentary electors and of those who are entitled to vote as local government electors, but shall be framed so as to shew in separate divisions, or otherwise to distinguish the names of those who are entitled to vote (a) both as parliamentary and local government electors; (b) as parliamentary electors but not as local government electors; and (c) as local government electors but not as parliamentary electors. Where a person whose name is entered as a local government elector in any registration unit is not entitled to vote in respect of that entry at the local government elections for all the local government electoral areas which comprise that unit a mark is placed by the registration officer against that person's name, with a note to signify that the person against whose name the mark is placed is not entitled to vote for the local government elections mentioned in the note, which is deemed to be part of the register.²

518. Where the registration unit is situated in a parliamentary borough the names in the register are arranged in street order, unless the council appointing the registration officer considers that, having regard to the general character of the area forming the registration unit, arrangement in street order is inapplicable; and where the registration unit is situated in a parliamentary county the names in the register are arranged in alphabetical order, unless the said authority considers that, having regard to the general character of the area forming the registration unit, arrangement in street order is possible and convenient.³

519. The registers for the registration units making up any constituency, so far as they relate to parliamentary electors, shall together form the register of parliamentary electors for that constituency, and the registers of the registration units making up any local government electoral area, so far as they relate to local government electors, shall together form the register of local government electors for that area.⁴

SUBSECTION (4).—*Out Voters List.*

520. There shall be added, as a supplement to that portion of the register which relates to any polling district, a list giving with respect to persons who, though not resident in that polling district, are entitled to vote at a polling place for that district under Rule 24 of the First Schedule to the Act, the same particulars as are contained with respect

¹ Rule 1.

² Rule 2.

³ Rule 4.

⁴ Rule 5.

to those persons in the register, including a reference to the polling district where any such person is registered: Provided that the names shall be numbered consecutively after the other names in the register for such first-mentioned polling district.¹

SUBSECTION (5).—*Absent Voters List.*

521. There shall be added as a supplement to the register a separate list (referred to as the absent voters list) for the whole registration area or, where the area includes more than one constituency, for each constituency in the area, of persons entitled to vote as absent voters, without, however, removing the names of those voters from any other part of the register. Every such list shall be made up according to polling districts. The names in the absent voters list shall be numbered either consecutively, beginning with the number following the last number on the part of the register relating to the polling district, or by repeating, as respects each absent voter, the number appended to his name in the register, and the names of persons in the register whose names are included in the absent voters list shall be marked in the register with the letter "a."¹

SUBSECTION (6).—*Corrupt and Illegal Practices List.*

522. The registration officer must annually make out a list containing the names and description of all persons in the constituency who are disqualified from voting at a parliamentary election by reason of having been found guilty of a corrupt or illegal practice under the Corrupt and Illegal Practices Act, 1883, or under the Election (Scotland) (Corrupt and Illegal) Practices Act, 1890, and he must also state in the list the offence of which each person has been found guilty. Any person named in the list may claim to have his name omitted therefrom, and any person entitled to object to any list of voters for any county or burgh may object to the omission of the name of any person from such list.² The list must be appended to the register of electors and printed and published therewith wherever the same is printed and published.

SECTION 5.—PROCEDURE IN COMPILATION OF REGISTER.

523. The principal steps in the procedure in the compilation of the register of electors are (a) the survey of the electorate, (b) the revision of the existing register and the publication of the electoral lists, and (c) the compilation and publication of the new register.

SUBSECTION (1).—*The Survey—House to House.*

524. It is the duty of the registration officer to cause a house-to-house or other sufficient inquiry to be made, for each registration unit

¹ R.P. 134, Rule 4.

² 46 & 47 Vict. c. 51, s. 39.

within his registration area, of all persons appearing to be entitled to be registered as parliamentary or local government electors.¹ This inquiry or survey is the initial step in the preparation of the new register, the efficiency of which depends largely on the completeness and accuracy of the survey. The survey is carried out usually either (a) by means of survey cards, there being a card for each dwelling-house, in which are already entered the names of all adult persons, male and female, who were resident therein at the time of the former survey, or (b) by means of information derived from householders or other persons required to furnish the same by the registration officer, or (c) by a combination of these two methods. To enable the registration officer to acquire the information required for registration purposes under the second method he may require any householder or any person owning or occupying any land or premises within his area, or the agent or factor of such person, to give in the prescribed form any information in his possession, under liability on summary conviction to a fine not exceeding £20 for failure to do so.²

SUBSECTION (2).—*Electors Lists.*

525. After the inquiry or survey is completed it is the duty of the registration officer from the information so acquired, and also from (a) any statement of any naval or military voter, made in the prescribed form, that he would have had the necessary qualification but for his service, or (b) (subject to verification by the registration officer) any statement containing similar particulars supplied by or on behalf of the Admiralty, Army Council, or Air Council, as provided under s. 5, subs. (2) of the Act, to prepare electoral lists for each registration unit of all persons appearing to be entitled to be registered as parliamentary or local government electors.¹ If it appears to the registration officer, after inquiry aforesaid, that any person serving as a member of any of the naval, military, or air forces of the Crown is entitled to be registered as a parliamentary elector in respect of qualifying premises in the registration area in pursuance of s. 5 of the Act, and is not so registered in the register in force, he shall, if he has not already received from that person a statement in the prescribed form in accordance with subs. (2) of that section, forthwith notify the person in writing that, unless such statement is received from him, he will not be registered in respect of the premises, and the registration officer shall not, unless and until he receives such statement, include the name of the person as a parliamentary elector in the electors lists in respect of the premises.

526. The electors lists for each unit within the registration area of all persons appearing to be entitled to be registered as parliamentary or local government electors are to be in the form in which the register is to be framed.¹

¹ Rule 6.

² R.P. 134, Schedule II., i., Forms A and B, as amended by S.R. & O., 1928, No. 645 n.; 1918 Act, Schedule I., Rule 35.

The electors lists for a registration unit shall consist of—

List A.—A copy of the register in force for the unit.

List B.—A list of newly qualified electors—*i.e.* persons who are qualified for registration as parliamentary or as local government electors in respect of qualifying premises for which they are not registered in the register in force, or for which they have become entitled to be registered in a different voting capacity.

List C.—A list of persons no longer qualified as electors—*i.e.* persons who, being registered in respect of qualifying premises in the register in force, have ceased to be qualified for registration as parliamentary or as local government electors in respect of those premises, or have become entitled to be registered in respect of those premises in a different voting capacity.

Where, since the publication of the register, the area of a registration unit has been altered, the register in force shall be deemed to be the register or registers for the unit or units or any part of which is comprised in the new unit.¹

SUBSECTION (3).—*Absent Voters List.*

527. The absent voters list is made up by the registration officer.² Three classes of persons are entitled to be included in the list:

- (1) Any person, registered as a parliamentary voter, who, not later than the first day of September makes a claim in the prescribed form,³ and satisfies the returning officer that he or she, by reason of the nature of his or her occupation, service, or employment, may be debarred from voting at a poll at parliamentary elections held during the time the register is in force. When the name of a person has been placed on the register in pursuance of such a claim, his or her name shall be placed on the absent voters list for each subsequent register, so long as he or she continues to be registered for the same qualifying premises, and the registration officer is satisfied that he or she continues in such occupation, service, or employment as aforesaid, unless he or she gives notice in writing to the registration officer that he or she does not wish his or her name to be placed on the list.⁴
- (2) Any naval or military voter, without any claim being made for the purpose, unless—
 - (a) that person not later than the first day of September gives notice to the registration officer that he does not desire to be placed upon that list; or
 - (b) that person is registered in pursuance of a claim for the purpose for the constituency in which he has an actual residence qualification; or

¹ R.P. 134, Rule 2.

³ R.P. 134, Schedule I., vi.

² Rule 16.

⁴ R.P. 134, Rule 10.

- (c) that person is serving for a temporary period during an emergency or for purposes of annual training either in His Majesty's naval, army, or air-force reserves or in the territorial force;¹ and
- (3) Any merchant seaman, pilot, or fisherman who is a naval or military voter, and who has made a statement received by the registration officer, in the prescribed form,² which if it includes a statement of actual residence is to be treated as a claim and declaration for the purposes of s. 5 (1) of the Act, unless that person has given notice that he does not so desire.¹

SUBSECTION (4).—*Publication of Lists.*

528. The registration officer shall publish on or before the eighth day of August the electoral lists in the form in which the register is to be framed, together with the corrupt and illegal practices list (if any), made by him under s. 39 of the Corrupt and Illegal Practices Prevention Act, 1883, or under s. 29 of the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890, and keep the same published until 2nd September following.³ The registration officer shall at the same time publish a notice specifying the mode in which, and the time within which claims and objections are to be made under the rules specified in the First Schedule to the Act. No specific provision is made as to the mode of publication, but sufficient publication will be made if the registration officer makes copies of the documents available for inspection by the public in his office, and in the chief post office or some other convenient place in the area forming the registration unit to which the document relates, and in any other manner which is in his opinion desirable.⁴

SUBSECTION (5).—*Registration Claims.*

529. Any person who claims to be entitled to be registered as a parliamentary or local government elector, and who is not entered or is entered in an incorrect place or manner or with incorrect particulars, may claim to be registered, or to be registered correctly, by sending to the registration officer a claim in the prescribed form⁵ not later than the twenty-second day of August.⁶ Where the claim is made on behalf of a claimant by another person it is essential to its validity that the prescribed form shall contain a declaration giving the same particulars as to the person on whom the claim is made as that person would be required to give if he were claiming on his own behalf, and the omission of such particulars cannot be cured by the subsequent proof thereof.⁷ And in such a case in any Court the registration officer shall not enter

¹ Rule 17.

² R.P. 134, Schedule II., v.

³ Rule 6.

⁴ Rule 31.

⁵ (a) By person on own behalf, R.P. Order, R.P. 134, Schedule II., head II. (1); (b) by one person on behalf of another, Schedule II., head II. (2).

⁶ Rule 10.

⁷ *Campbell v. Purdy*, [1920] 2 I.R. 186.

the name of the claimant on the register unless the matters required to be stated in the declaration in the claim are proved to his satisfaction.

530. Where (a) the statement of any naval or military voter made in the prescribed form¹ that he would have had the necessary qualification in any constituency but for his service; or (b) (subject to verification by the returning officer) any statement containing similar particulars supplied by or on behalf of the Admiralty, Army Council, or Air Council, is received by the returning officer too late for the purpose of the inclusion of the elector's name in the electors list that statement may be treated as a claim to be registered.

531. Any person registered as a parliamentary elector, if qualified, may not later than the first day of September make a claim, in the prescribed form, to be placed on the absent voters list.²

532. Any person named in the corrupt and illegal practices list may not later than the twenty-second day of August make a claim to the registration officer to have his name omitted therefrom.³ The registration officer in considering such a claim has no jurisdiction to determine other than whether or not the claimant has been found guilty of a corrupt or illegal practice on conviction, or by the report of any election Court or electoral commissioner.⁴

SUBSECTION (6).—*Objections to Claims.*

533. Any person whose name appears on the electoral lists for a constituency or local government electoral area may object to the registration of any person—

- (a) whose name is included in the electoral lists for the constituency or the local government electoral area, as the case may be, by sending notice of objection in the prescribed form⁵ to the registration officer not later than the twenty-second day of August; and
- (b) whose name is included in the list of claimants to be included in the electoral lists as aforesaid by sending notice of objection in the prescribed form⁶ to the registration officer not later than the third day of September.⁷

A person whose name is contained in List C of the electoral lists shall not, unless his name is contained also in List B, be deemed to be a person whose name appears on the electoral lists so as to entitle him to object.⁸

534. A specific notice of objection must be sent to the returning officer in respect of each claim objected to. It is incompetent to have

¹ R.P. 134, Rule 12.

² Rule 16.

³ 46 & 47 Vict. c. 51, s. 39 (4).

⁴ *Fletcher v. Airdrie Registration Officer*, 1922, S.L.T. (Sh. Ct.) 73; 1923, S.L.T. (Sh. Ct.) 13.

⁵ Rule 12.

⁶ R.P. 134, Schedule II., head IV. (1).

⁷ *Ibid.*, Schedule II., head IV. (2).

⁸ R.P. 134, Rule 2.

one notice of objection with a schedule of persons objected to amongst them.¹

SUBSECTION (7).—*Notice to Persons affected by Objections.*

535. The registration officer shall, as soon as practicable after receiving any notice of objection, send a copy of the notice to the person in respect of whose registration the notice of objection is given.²

SUBSECTION (8).—*Publication of Objections.*

536. The registration officer shall publish a list of the names of persons to whose registration notice of objection has been given, not later than the twenty-ninth day of August, and keep the same published until the fourth day of September.³ He shall also, as soon as practicable after the third day of September, publish a list of the names of persons included in the list of claimants to whose registration notice of objection has been given, and keep the same published until the date of coming into force of the new register.⁴

SUBSECTION (9).—*Consideration of Objections.*

537. The registration officer shall as soon as practicable consider all objections of which notice has been given to him, and shall give at least five clear days' notice to the objector and to the person in respect of whose registration the notice has been given of the time and place at which the objection will be considered by him.⁵

SUBSECTION (10).—*Consideration of Claims.*

538. The registration officer shall also consider all claims of which notice is given to him, and in respect of which no notice of objection is given. Where the registration officer does not admit a claim without inquiry he shall give at least five clear days' notice to the claimant of the time and place at which the claim will be considered by him.⁶ At the hearing of any objection or claim by the registration officer, any person interested may appear and be heard either in person or by any other person, other than counsel on his behalf.⁷ The registration officer has wide powers to require declaration as to age and nationality and evidence of birth of a claimant, and to require evidence on oath in support of any claim or objection.⁸ If on the consideration of any claim or objection it appears to the registration officer that the claimant or person in respect of whose name objection is taken is not entitled

¹ *Sinclair v. O'Kane*, [1919] 2 I.R. 419.

² Rule 13.

³ Rule 14, amended by R.P. 134, Rule 5, and Schedule IX.

⁴ Rule 15, amended by R.P. 134, Rule 5, and Schedule IX.

⁵ Rule 20.

⁶ Rule 21.

⁷ Rule 39.

⁸ Rules 38 and 40.

to be entered on the register in the character in which he claims to be registered, or in which he is entered on the list, but is entitled to be entered on the register in another character, or in another place on the register, the registration officer may decide that the name of that person shall be so entered on the register.¹

SUBSECTION (11).—*Correction of Lists.*

539. The registration officer shall make such additions and corrections in the electors lists (including the absent voters list) as are required in order to carry out his decisions on any objections or claims, and shall also make any such corrections in those lists by way of the removal of duplicate entries (subject to any expression of choice by the person affected as to those entries), the expunging of the names of persons who are dead or subject to any legal incapacity, or the placing of marks or the correction of marks placed against the name of an elector, or otherwise as he thinks necessary in order to secure that no person is registered as a parliamentary elector in respect of more than one qualification in the same constituency, or as a local government elector in more than one qualification—

(a) in the same borough for the purpose of borough council elections; or

(b) in the same electoral division or ward for the purpose of county council, metropolitan borough council, and urban district council elections; or

(c) in the same parish or ward of a parish for the purpose of rural district council guardian or parish elections;

and otherwise to make those lists complete and accurate as a register.²

SUBSECTION (12).—*Objections to Corrections.*

540. Where the registration officer makes any correction in the lists (including the absent voters list) otherwise than in pursuance of a claim or objection, or for the purpose of correcting a clerical error, he shall give notice to the person affected by the correction and give that person an opportunity of objecting to the correction, and, if necessary, of being heard with respect thereto.³

SUBSECTION (13).—*Formation of Lists into Register.*

541. The registration officer shall make all the necessary corrections of the lists (including the absent voters list), and do everything necessary to form those lists into a register (with a separate letter and a separate series of numbers for each polling district), in time to allow the publication of the lists so corrected as a register.⁴

¹ Rule 22.

² Rule 23.

³ Rule 25.

⁴ Rule 26.

SUBSECTION (14).—*Publication of Register.*

542. It is the duty of the registration officer to publish the register not later than the 15th day of October in each year, by publishing a notice that a copy of the register is open to inspection at his office, and that copies of the part of the register relating to any registration unit are open to inspection during business hours in the registration unit at the place mentioned in the notice, which is to be either the principal post office or at some other convenient place to which the public have access, or, if there is no convenient post office or other place within the unit available, then at a like place outside the registration unit.¹ The registration officer must, during business hours, furnish to any applicant copies of the register or of so much of the register as relates to any registration unit ² on payment of the prescribed fee.³

SECTION 6.—REGISTER OF ELECTORS FOR YEAR 1929–1930.

543. The Representation of the People (Equal Franchise) Act, 1928, enacts ⁴:—

- (1) For the purpose of enabling the foregoing provisions of this Act to come into force as soon as may be—
 - (a) the qualifying period for the purpose of the register of electors to be made in the year 1929 shall end in Scotland on the 15th day of December, and elsewhere on the 1st day of December 1928, instead of on the dates fixed for the several parts of the United Kingdom respectively by the Representation of the People Acts, 1918 to 1926;
 - (b) the said register shall come into force on the 1st day of May 1929 instead of on the dates fixed for the several parts of the United Kingdom respectively by the said Acts, and shall, notwithstanding anything in this section, continue in force in the case of Northern Ireland until the 15th day of December 1930, and in any other case until the 15th day of October 1930.
- (2) It shall be lawful for His Majesty by Order in Council to make such alterations in the registration dates as may seem to him necessary for the purpose of the preparation of the register in the year 1929, and also such adaptations and modifications in the provisions of any Act . . . as may seem to him necessary to make those provisions conform with the alterations in the registration dates.
- (3) The register of electors which comes into force on the 15th day of October (or in Northern Ireland the 15th day of December) 1928 shall continue in force until the 1st day of May 1929, and no longer.

¹ Rule 27.
VOL. VII.

² Rule 28.

³ See R.P. 134, Schedule VII.

⁴ Sec. 6 (1).
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544. Under and in virtue of s. 6 (2), an Order in Council, dated 14th August 1928,¹ has, *inter alia*, fixed the registration dates for the purposes of the register of electors for 1929, and the length of time for publication of documents.

SECTION 7.—ABSENT VOTERS LIST—DURING CURRENCY OF REGISTER.

SUBSECTION (1).—*Record of Addresses.*

545. The registration officer shall keep a record of any addresses which may be furnished to him by any person placed in the absent voters list, or by the Admiralty, Army Council, Air Council, or Board of Trade, as the address which is to be for the time being the address of the voter for the purpose of the provisions relating to voting by absent voters, and as soon as practicable after the nomination shall cause instructions to be sent to the voter as to the mode of voting. Provided that in the case of an absent voter serving in His Majesty's Forces, other than an officer in the Army or Air Force, any address furnished by the voter, or by the Admiralty, Army Council, or Air Force, more than thirty days before the nomination of candidates at an election shall not be deemed to be the recorded address of the absent voter.² The record of addresses shall be open to inspection on the same conditions as relate to the register. The instructions sent by the registration officer, contained in a memorandum,³ inform the absent voter of the two methods available for recording his vote—by post and by proxy—and the procedure to be adopted if he desires to nominate a proxy.

SUBSECTION (2).—*Late Notification of Addresses.*

546. Any notification of an address or change of address of an absent voter received by the registration officer for the purpose of the record of addresses required to be kept under the Act may, if the notification is received too late for a ballot paper to be despatched to the voter at the time of the original issue of the ballot papers to absent voters at an election, be disregarded so far as regards that election, unless it appears to the returning officer that it is reasonably practicable to arrange for a subsequent issue of ballot papers to absent voters, and that there is a reasonable probability that a ballot paper sent at such issue to the absent voter at the address furnished in the notification could be returned⁴ by the absent voter so as to reach the returning officer before the close of the poll.⁴

SUBSECTION (3).—*Insufficient Addresses.*

547. Where no sufficient address in respect of an absent voter has been furnished to the registration officer for the purpose of the record

¹ S.R. & O., 1928, No. 645.

² Rule 18, amended by R.P. 134, Rule 16.

³ Card R.P. No. 37A.

⁴ R.P. 134, Rule 8.

of addresses required to be kept by him under Rule 19 of the First Schedule in the Act, the registration officer may record the qualifying premises in respect of which the voter is registered as the address of that voter for the purposes of the said rule, unless it appears to the registration officer that a ballot paper, if sent to that address, would reasonably be expected not to reach the voter.¹

SUBSECTION (4).—*Naval and Military Voters to be added to List.*

548. Where the registration officer receives from a person whose name is on the register, but not on the absent voters list, a statement indicating to his satisfaction that that person is a member of the naval, military, or air forces of the Crown, or is a person who has ceased to be a member of the naval, military, or air forces of the Crown, and is in a hospital or institution or is otherwise from his home for the purpose of training or treatment, and applying for his name to be placed on the absent voters list, that person shall, notwithstanding that the register has been published, be treated as an absent voter, and the names of such persons shall be added at the end of each copy of the absent voters list to be used by the returning officer at an election, and shall be numbered consecutively after the final name on that list according to the order in which they are inserted, or alternatively by the repetition of the numbers appended to the names of such persons in the register. The registration officer shall cause the appropriate mark to be placed on the copies of the register to be used by the returning officer at the election against the name of each such person indicating that he will vote as an absent voter. Where, however, any such statement and application is received less than one clear day before the day of nomination of candidates at an election, the statement and application may be disregarded for the purposes of that election.²

SUBSECTION (5).—*Removal from List.*

549. When the registration officer receives from a person whose name is on the absent voters list a duly authenticated application for his name to be removed from that list, that person shall, notwithstanding that the register has been published, be treated as though his name were not on the absent voters list, and the names of such persons shall be erased from each copy of the absent voters list to be used by the returning officer at an election, without, however, altering the number of any other name on the list. The registration officer shall cause any mark placed in the copies of the register to be used by the returning officer at the election against the name of any such person, indicating that he will vote as an absent voter, to be erased. Where any such application is received less than one clear day before the day of nomination

¹ R.P. 134, Rule 9 (1).

² *Ibid.*, Rule 13 (2), Rule 9 (2).

of candidates for an election the application may be disregarded for the purposes of that election.¹

SUBSECTION (6).—*Corrections on Register.*

550. The result of these provisions is that the copies of the register to be furnished by the registration officer to the returning officer for the purposes of an election must be corrected to shew, as at one clear day before the day of nomination of candidates, (a) the names of voters added to, (b) the names of voters deleted from, and (c) the corrected addresses of voters in, the absent voters list, and (d) the appropriate markings or deletions made on the register to give effect thereto.

SECTION 8.—PROXIES.

551. A person whose name is entered on the absent voters list can only vote as an absent voter by one of two methods, viz. by post, or by proxy. To meet the case of an absent voter being unable to vote by post owing to his not being in the United Kingdom, the alternative method of voting by proxy is provided.

SUBSECTION (1).—*What Persons may Vote by Proxy.*

552. Any person whose name is entered in the absent voters list, and who makes a statement in the prescribed form that there is a probability that he will at the time of a parliamentary election be at sea, or out of the United Kingdom, and satisfies the registration officer as to the *bona fides* of such statement, shall be entitled to appoint a proxy, and having appointed a proxy, to vote by proxy under the Act.² The exercise of this right, limited originally to naval or military voters, is now extended to all persons whose names are entered on the absent voters list. The voter does not require, in fact, to be at sea or out of the United Kingdom at the time of the election. If he anticipates that there is a probability of his being absent, and he satisfies the registration officer of the *bona fides* of his statement, he may vote by proxy, even although his anticipation is not realised.

SUBSECTION (2).—*Who may be Appointed a Proxy.*

553. A person shall not be appointed as proxy unless the person appointed is the wife, husband, parent, brother, or sister of the elector, or is registered as a parliamentary elector for the constituency or one of the constituencies in which the elector is registered. The brother or sister shall not be capable of being appointed proxy unless of full age.³ An elector shall not appoint more than one person as proxy to vote

¹ R.P. 134, Rule 9 (3).

² 1918 Act, s. 23 (4), substituted by 10 & 11 Geo. V. c. 35, s. 2.

³ 1918 Act, Third Schedule, s. 5.

on his behalf in the same constituency, and in any case not more than two persons.¹

SUBSECTION (3).—*Method of Appointment.*

554. A proxy must be appointed by means of a proxy paper issued to the elector, or to some person on behalf of the elector, or to the person appointed as proxy, by the registration officer of the registration area in which the elector is registered, on an application made or authorised by the elector.² The application must be in the prescribed form or in a form to the like effect.³ The elector nominates two persons whom he desires to be appointed in the order of first and second choice in case the first-named person is unwilling or disqualified to act.

555. The registration officer must, on receipt of any application for a proxy paper, issue a proxy paper to the applicant or to some person on his behalf, or to the person appointed as proxy, if he is satisfied that the applicant is (a) registered on the parliamentary register of electors for the constituency for which the application is made, and (b) at the time of the application entitled to appoint a proxy.⁴ He must also, if satisfied that a proxy may be appointed, intimate to the person nominated as first choice, unless he knows that that person is not qualified to be appointed or has expressed his unwillingness to act, that it is proposed to appoint him as proxy for the elector, and that if no notice is received within seven days intimating that he is unwilling or unable to act as such, a proxy paper will be issued to him and that he will be entered on the list of proxies. If at the expiration of the seven days no notice is received intimating that the person nominated as first choice is unable or unwilling to act as proxy, the registration officer, unless otherwise directed by the elector, is to send or deliver a proxy paper to that person, and enter his name on the list of proxies. He may do so within seven days if he is satisfied that the person nominated as first choice is willing and able to act as proxy. If within the seven days notice is received by the registration officer that the person nominated as first choice is unable or unwilling so to act, he must, if another person is nominated as second choice in the form of application, deal in like manner with the person so nominated.⁵

556. If neither nominee is able or willing to act as proxy or is qualified to act, or if for any other reason the registration officer does not comply with the application and issue a proxy paper, the registration officer must send a notice to the elector informing him that no proxy paper has been issued and explaining the reason.⁶

557. As soon as may be after issuing a proxy paper the registration officer must send notice of the fact to the elector, stating the name and address of the person to whom the paper has been issued.⁷

¹ 1918 Act, Third Schedule, s. 6.

⁴ 1918 Act, Third Schedule, s. 3.

⁶ *Ibid.*, Rule 31 (3).

² *Ibid.*, ss. 1, 15.

⁵ R.P. 134, Rule 31 (1) and (2).

⁷ *Ibid.*, Rule 31 (4).

³ R.P. 134, Part IV. s. 30.

SUBSECTION (4).—*Late Application.*

558. Where the registration officer receives an application for the issue of a proxy paper less than one clear day before the day of nomination of candidates at an election the application may for the purposes of that election be disregarded.¹

SUBSECTION (5).—*Continuance and Effect of a Proxy Paper.*

559. A proxy paper shall remain in force, unless cancelled, so long as the elector continues to be registered in respect of the same qualification and to be on the absent voters list.² After a proxy paper for any constituency has been issued in accordance with the Act, the elector shall, unless the proxy paper is cancelled, (a) be entitled to vote by proxy in that constituency, and (b) be prohibited from voting otherwise than by proxy in that constituency until the time for which the proxy paper is in force has expired.³

SUBSECTION (6).—*Cancellation of Proxy.*

560. A notice to the registration officer cancelling a proxy paper shall be in the prescribed form or in a form to the like effect.⁴ A notice cancelling a proxy paper shall not take effect as respects any election unless it is received by the registration officer before the day of nomination.⁵ Where a proxy paper is cancelled, the registration officer shall send notice of the cancellation to the person who has been appointed proxy under the cancelled paper and shall delete his name from the list of proxies.⁶ A voter on the absent voters list, by cancelling the appointment of a proxy, does not cease to be an absent voter. He continues on the absent voters list and will only be entitled to vote as an absent voter.

SUBSECTION (7).—*List of Proxies.*

561. The registration officer must keep a list of absent voters entitled to vote by proxy in any constituency within his area, and of the persons entitled to vote as proxies. The list is to be open to inspection during business hours at some convenient place in the constituency, and any person is to be allowed, on application to the registration officer, to take extracts from, or, on payment of the prescribed fee, is to be supplied with copies of the list.⁷ The list of proxies, in contradistinction to the absent voters list, is not a supplement to and forms no part of the register of voters. Its only purpose is to record the names of (a) absent voters who have appointed proxies, and (b) the names of proxies so appointed.

¹ R.P. 134, Rule 33.² 1918 Act, Third Schedule, s. 4.³ *Ibid.*, s. 2.⁴ R.P. 134, Rule 34, Schedule V., No. III.⁵ 1918 Act, Third Schedule, s. 14.⁶ R.P. 134, Rule 35.⁷ 1918 Act, Third Schedule, s. 8.

562. No mark is made upon the register of voters to indicate that a proxy paper has been issued, and none is necessary. No ballot paper can be issued by a presiding officer in respect of any voter marked on the register as an absent voter except on production to him of a proxy paper in the prescribed form, issued by the registration officer.¹

SECTION 9.—APPEALS FROM REGISTRATION OFFICER.

SUBSECTION (1).—*Nature of Appeal.*

563. The decisions of the registration officer in considering and determining claims and objections in making up the register of voters are subject to a right of appeal by any person dissatisfied (1) to the Sheriff Court on any question of fact or law, or both; and (2) to the Court of Appeal of three judges of the Court of Session, constituted by the 23rd section of the Representation of the People (Scotland) Act, 1868, of any decision of the Sheriff on any question of law. The right of appeal and the procedure therein are defined and regulated by the 14th section and the First Schedule of the 1918 Act, and Act of Sederunt of the Court of Session dated 18th July 1918.

SUBSECTION (2).—*Persons who may Appeal.*

564. An appeal shall lie to the Sheriff Court, as defined by rules of Court, from any decision of the registration officer on any claim or objection which has been considered by him under the Representation of the People Act, 1918, or the placing or refusal to place any mark against any name on the register.² It is a condition precedent to a right of appeal, that the appellant should have conformed to the registration rules prescribed in the First Schedule and submitted his case to the registration officer.² It is thought the definition is sufficiently wide to include the decision of a registration officer refusing an application by an absent voter for the issue of a proxy paper during the currency of the register of voters, but after its completion.

SUBSECTION (3).—*Notice of Appeal.*

565. A person desiring to appeal against the decision of a registration officer must give notice of appeal in the prescribed form to the registration officer and to the opposite party, if any, when the decision is given, or within five days thereafter, specifying the grounds of appeal.³ The time specified within which notice is to be given must be strictly observed, and has been held to be peremptory.⁴

¹ *Brander v. Solicitor*, 1923, S.L.T. (Sh. Ct.) 109.

² 1918 Act, s. 14 (1).

³ *Ibid.*, First Schedule, Rule 29; R.P. 134, Schedule II., Form VII. (1), (2).

⁴ *Fletcher v. Registration Officer of Airdrie*, 1922, S.L.T. (Sh. Ct.) 73.

SUBSECTION (4).—*Duty of Registration Officer on Receipt of Notice of Appeal.*

566. The registration officer shall, within ten days after receiving the prescribed notices of appeal and of intimation to the opposite party (if any) required by the Act, forward to the sheriff-clerk of the county in which the qualifying premises are situate the notices, together with the statements specified in Rules 29 and 30 of the First Schedule of the Act.¹

567. The Rules are as follows: The registration officer shall forward in each case a statement of the material facts which in his opinion have been established in the case, and of his opinion upon the whole case, and on any point which may be specified as a ground of appeal, and shall also furnish to the Court any further information which the Court may require and which he is able to furnish.² Where it appears to the registration officer that any notices of appeal given to him are based on similar grounds, he shall inform the Sheriff Court of the fact for the purpose of enabling the Sheriff Court (if the Court thinks fit) to consolidate the appeals or to select a case as a test case.³ The direction as to the sheriff-clerk of the county to which the notice of appeal is to be sent removes any dubiety which might exist in the case of a constituency which includes more than one sheriffdom. The direction to the registration officer to forward notice of "intimation to the opposite party" will only be capable of fulfilment if the appellant furnishes the same to the registration officer voluntarily, as there is no direction to him to do so.

568. There are no specific directions to guide the registration officer in framing the statements to be forwarded by him to the sheriff-clerk. Having regard to the informal character of the proceedings before the registration officer, and the parties appearing being in many cases unacquainted with the ordinary rules of procedure, it is thought the registration officer in his statement required by Rule 29 should articulately detail (a) the steps of procedure, (b) the specific facts proved, (c) the contentions of parties, and (d) his decision. The information required under Rule 30 may be set out in a separate and additional statement or, it is thought, may be embodied in the first-named statement.

SUBSECTION (5).—*Procedure in the Sheriff Court.*

569. Thereafter the appeal shall be disposed of by the Sheriff with all convenient speed.⁴ The registration officer shall be deemed a party to the proceedings.⁵ No time limit is fixed for disposing of appeals as was imposed under the former procedure. The Act of Sederunt does not contain any enactment adapting the Sheriff Court Acts and the procedure therein to the conduct of the appeal as the Court are empowered to do,⁶ and as has been done in the English County Court Rules. In the

¹ A.S., Rule I. (1).

⁴ A.S., Rule I. (2).

² 1918 Act, First Schedule, Rule 29.

⁵ 1918 Act, s. 14 (5).

³ *Ibid.*, Rule 30.

⁶ *Ibid.*, s. 14 (1).

absence of any such enactment it must be assumed that the appeal is to be treated as a "summary application" as defined and regulated by the Sheriff Court Act. The intention of the statute apparently is that where there are several appeals raising the same question the Sheriff should at the outset either (1) consolidate the appeals, or (2) select one appeal as a test case, but there is no procedure provided to enable him to do so. Under the former law the procedure in the registration Courts was strictly limited to the powers conferred by statute. As all the previous statutes have been repealed, little or no assistance can be derived from the decisions themselves.

570. A further difficulty may arise where parties do not accept the facts as stated by the registration officer, as to what proof is to be allowed, and what effect is to be given to the statement furnished by the registration officer. Under the English County Court Rules ¹ an allowance of proof is in the discretion of the County Court judge, and the statement by the registration officer is to be regarded as *prima facie* evidence of the facts stated therein, and the onus is upon the appellant to prove the contrary.

SUBSECTION (6).—*Intimation of Judgment in Appeal.*

571. The sheriff-clerk shall, within seven days after the judgment disposing of the appeal, send notice to the registration officer of the decision of the Sheriff unless an appeal to the Court of Appeal against such judgment has been duly intimated.² Although there is no express direction, it is thought from the further procedure set out in regard to appeals from the Sheriff that there is an implied obligation upon the sheriff-clerk to intimate the judgment of the Sheriff immediately to all the parties to the appeal, specifying the result; and to grant a certificate of the date and time of posting the same.

SUBSECTION (7).—*Appeal from Sheriff to Court of Appeal.*

572. Any person entitled to appeal under s. 14 (2) of the Act may, by minute lodged with the sheriff-clerk within five days after intimation of the Sheriff's decision, require the Sheriff to state a special case setting forth the facts and point of law, and the Sheriff's decision thereon. Such minute shall state the point of law and shall be at the same time intimated by the appellant in writing to the opposite party.³ This section omits the case of the registration officer who is dissatisfied with the judgment of the Sheriff and who is a party to the appeal. It is submitted that an Act of Sederunt can only deal with and regulate procedure, and cannot derogate from the statutory right of the registration officer. There is no provision for reckoning the five days within

¹ S.R. & O., 1918, No. $\frac{802}{127}$, Rule 11, and 1919, No. $\frac{162}{12}$.

² A.S., Rule I. (2).

³ A.S., Rule I. (1).

which the notice of appeal must be given, but presumably it will be calculated from the day after intimation is given by the sheriff-clerk.

573. There is no statutory form prescribed for the minute of appeal, as in an appeal from the registration officer. The minute must state (1) the facts as they are contended for by the appellant; and (2) the point of law the appellant desires submitted for appeal, which should be stated specifically, and not merely in general terms. Under the former law the Court refused to consider a question which had not been raised before the Sheriff although the facts stated and the questions of law set forth in the special case were sufficient to cover it.¹

574. The Sheriff shall forthwith prepare and deliver to the appellant a special case in ordinary form.² There is no direction to the Sheriff to submit the special case in draft to the parties, which apparently is unnecessary as the whole facts should be before him in the minute for the appellant and the original statement by the registration officer. The appellant shall, within fourteen days of the delivery to him of such special case, transmit the same to the clerk to the First Division of the Court of Session, Register House, Edinburgh, together with six printed copies. He shall also at the same time send copies to the respondent and the registration officer.³ The special case will be printed and regulated according to the ordinary procedure regulating the Court of Session in such cases.

575. The Court of Appeal shall thereafter, with all convenient speed, hear parties, and give their decision on such special case, and shall specify every alteration, if any, to be made upon the register in pursuance of such decision.⁴ A copy of such judgment shall, within three days, be sent by the clerk of Court to the registration officer.⁵ In all appeals under the Act the Court shall have power to award and decern for expenses.⁶ In the judgment of the Sheriff he will dispose of the question of expenses.

SUBSECTION (8).—*Saving Rights of Voter Pending an Appeal.*

576. The right of voting of any person whose name is for the time being on the register shall not be prejudiced by any appeal pending, and any vote given in pursuance of that right shall be as good as if no such appeal were pending, and shall not be affected by the subsequent decision of the appeal.⁷

SUBSECTION (9).—*Rectification of Register.*

577. The registration officer, on receipt of notices sent to him by the sheriff-clerk or the clerk of Court to the Court of Appeal of the decisions of the Sheriff Court or Court of Appeal in any appeal, shall make such

¹ *M'Kergow v. White*, 1910 S.C. 215.

⁴ A.S., Rule II. (4).

⁶ A.S., Rule III.

² A.S., Rule II. (2).

⁵ A.S., Rule II. (5).

⁷ 1918 Act, s. 14 (3).

³ A.S., Rule II. (3).

alterations in the electors list or register as may be required to give effect to the decision.¹

SECTION 10.—EXPENSES OF REGISTRATION.

578. Any expenses properly incurred by any registration officer in the performance of his duties in relation to registration, including all proper and reasonable charges for trouble, care, and attention in the performance of those duties, and any costs incurred by him as party to an appeal (in the Act referred to as “registration expenses”), are to be paid by the council appointing the registration officer: where a burgh within the meaning of the Local Government (Scotland) Act, 1889, is not a separate registration area, it is provided that the council thereof shall pay to the council appointing the registration officer a contribution towards the registration expenses, and subs. (4) of s. 60 and s. 66 of that Act are to apply with the necessary modifications to such contribution. The amount necessary to defray any registration expenses or any contribution thereto, as the case may be, is assessed and levied in any one of the modes allowed by the Valuation Acts with respect to the costs and expenses of making up the Valuation Roll.²

579. The Treasury are empowered to frame a scale of registration expenses applicable to all or any class or classes of these expenses, and to alter the scale as and when they see fit.³ The existing scale of registration expenses framed by the Treasury is dated 15th December 1926.⁴ Any expenses incurred by the registration officer of a class to which the scale is applicable are taken to be properly incurred if they do not exceed the maximum amount determined by or in accordance with the scale, and so far as they do exceed that amount are taken not to have been properly incurred unless the excess is specially sanctioned by the council and the Treasury either before or after the expenses have been incurred. If any question arises whether any expenses incurred by the registration officer of a class to which the scale is not applicable have been properly incurred or not, that question is to be referred to the Secretary of State for Scotland, and the decision of the Secretary of State shall be final.⁵

580. Any fees or other sums received by the registration officer in respect of his duties as such officer, other than sums paid to that officer in respect of his registration expenses, are to be accounted for by him and paid to the credit of the fund or rate out of which the expenses of that officer are paid.⁶ These are the fees exigible for the documents to be supplied by the registration officer in term of Rules 28 and 33 of the First Schedule to the Act.⁷

581. It is provided that in aid of the fund or rate out of which any registration expenses are paid by the council of any county or burgh

¹ 1918 Act, s. 14 (4).

² *Ibid.*, s. 43 (11).

³ *Ibid.*, s. 15 (2).

⁴ S.R. & O., 1926, No. 1568
S49.

⁵ 1918 Act, s. 15 (2).

⁶ *Ibid.*, s. 15 (3).

⁷ R.P. 134, Schedule VII.

under the Act, one-half of the amount so paid by the council shall be paid out of moneys provided by Parliament.¹

PART III.—ELECTIONS.

SECTION 1.—WHEN AN ELECTION IS CAUSED.

582. A parliamentary election is caused by a dissolution of Parliament, when every seat becomes vacant and a general election ensues. Parliament may be dissolved at any time, but a dissolution must take place not later than five years after the day on which by the writ summoning it the Parliament was appointed to meet.²

583. An election, however, known as a by-election, may occur when a particular seat becomes vacant. A vacancy may be caused by: (1) a member accepting office from or under the Crown; ³ (2) his elevation or succession to the peerage; (3) his being certified a lunatic; ⁴ (4) his death; (5) his being adjudicated a bankrupt; ⁵ (6) his being disqualified when elected; (7) his being returned for more than one constituency at a general election, and electing for which constituency he will serve; (8) his sitting or voting without taking the oath or affirmation; ⁶ (9) his being unseated on petition; or (10) his expulsion from the House of Commons.

584. A member no longer vacates his seat by reason only of his acceptance of an office of profit, if that office is an office the holder of which is capable of being elected to or sitting or voting in the Commons House of Parliament.⁷ These offices, which are very numerous, include the Lord High Treasurer, the Commissioners of the Treasury, the Chancellor of the Exchequer, the Comptroller, the Treasurer, and Vice-Chamberlain of His Majesty's Household, and Equerry or Groom in Waiting to His Majesty, the President of the Privy Council, six Principal and six Under-Secretaries of State, Paymaster-General, Postmaster-General, Lord High Admiral, Chancellor of the Duchy of Lancaster, Attorney-General and Solicitor-General for England, Lord Advocate and Solicitor-General for Scotland, President and Parliamentary Secretary of the Board of Trade, Minister of Agriculture and Fisheries, Minister of Health, Minister of Labour, Minister of Transport, First Commissioner of Works, five Commissioners of the Admiralty, Minister of Pensions, Secretaries of the Treasury, Admiralty, and War, and Secretary of Mines. The number of principal Secretaries of State and Under-Secretaries capable of sitting and voting in the Commons House of Parliament at any one time is limited to six.⁸ If at a general election

¹ 1918 Act, s. 15 (4).

² 1 Geo I. stat. 2, c. 5; amended 1 & 2 Geo V. c. 13, s. 5.

³ 6 Anne, c. 41, ss. 24, 25.

⁴ 49 & 50 Vict. c. 16, s. 2.

⁵ 46 & 47 Vict. c. 52, s. 32 (1), (2).

⁶ 29 & 30 Vict. c. 19, s. 5; 9 & 10 Geo. V. c. 2.

⁷ 9 & 10 Geo. V. c. 2, s. 1; amended 16 & 17 Geo. V. c. 19, s. 1 (1).

⁸ 21 & 22 Vict. c. 106, s. 4; 16 & 17 Geo. V. c. 18, s. 3.

more than six holding the office of Principal Secretary or Under-Secretary are returned, their elections are not invalidated, but none are entitled to sit or vote until the number is reduced to six by death, resignation, or otherwise.

585. As a member once elected is incapable of resigning his seat, to enable him to do so it is specially declared that the acceptance by a member of the office of the Steward or Bailiff of the three Chiltern Hundreds, or of the Manors of East Hendred, Northstead, or Hemp-holme is an office of profit which vacates his seat.¹

SECTION 2.—WHO MAY BECOME A CANDIDATE.

586. Any person who is a British subject, irrespective of sex or marriage, may be a candidate for election as a member of the Commons House of Parliament, except (1) persons who are inherently incapacitated from being registered as parliamentary electors,² as also Judges of the High Court of Justice and of the Court of Appeal³ and County Court Judges in England,⁴ the Judges of the Supreme Court of Judicature in Northern Ireland,⁵ and in Scotland the Judges of the Court of Session,⁶ Sheriffs⁷ and Sheriffs Substitute;⁸ (2) any ordained priest or deacon in the Church of England, or an ordained minister of the Church of Scotland, or in holy orders in the Church of Rome; (3) any person having a pension from the Crown during pleasure or for any term or number of years.⁹ But a person enjoying a pension granted for diplomatic service or civil service or in receipt of an old age pension is not disqualified;¹⁰ (4) any Government contractor, who is defined as “any person directly or indirectly . . . undertaking or enjoying in whole or in part any contracts . . . made with the Commissioners of the Treasury . . . or generally on account of the public service.”¹¹ The disqualification extends during the time the person holds such contract or any share thereof or any benefit or emolument arising therefrom. It does not extend to the members of incorporated trading companies or of companies composed of more than ten members existing in 1782, when the contracts are made with these companies in their corporate capacity.¹² It does not apply to any person on whom the completion of the contract has devolved by descent or limitation or by marriage, or as devisee, legatee, executor or administrator, until after twelve calendar months’ possession of the contract.¹³ It has been held that the disqualification is limited to executory contracts only, and not to contracts completely executed except for payment of the contract price.¹⁴ A contract does not disqualify if the person had no means of knowing that he was dealing with the

¹ 9 & 10 Geo. V. c. 2, s. 1 (1), proviso.

² See para. 464, *supra*.

³ 51 & 52 Vict. c. 43, s. 8.

⁴ 15 & 16 Geo. V. c. 49, s. 32 (2).

⁵ 10 & 11 Geo. V. c. 67, s. 41.

⁶ 7 Geo. II. c. 16, s. 4.

⁷ 21 Geo. II. c. 19, s. 11.

⁸ 2 & 3 Will. IV. c. 65, s. 36.

⁹ 6 Anne, c. 41, s. 24; 1 Geo. I. stat. 2, c. 56.

¹⁰ 32 & 33 Vict. c. 43, s. 17; 32 & 33 Vict. c. 15, s. 1; 22 & 23 Geo. III. c. 41, s. 1.

¹¹ 22 Geo. III. c. 45, s. 1.

¹² *Ibid.*, s. 3.

¹³ *Ibid.*, s. 6.

¹⁴ *Royce v. Birley* (Manchester case), 1869, L.R. 4 C.P. 296.

Government.¹ The contract must be directly with the Government, and the disqualification does not extend to a sub-contractor. An order to insert a Government advertisement in a newspaper has been held not to subject to penalties.² And a lessee of a railway from the Public Works Loan Commissioners in Ireland was held not disqualified either on account of his being such lessee or by reason of his conveying mails on his railway under a contract with the Postmaster-General.³ But a member of a firm which entered into contracts for loans for the purchase of silver with the Secretary of State for India in Council was held disqualified.⁴ To avoid questions arising regarding public loans, the Act authorising the loan usually now excludes the disqualification.⁵

SECTION 3.—RETURNING OFFICERS.

SUBSECTION (1).—*The Returning Officer.*

587. In every parliamentary election (other than a university election) the returning officer is the Sheriff of the sherrifdom within which the constituency is wholly situated, or where the constituency is situated in more than one sherrifdom, the Sheriff specified in the Seventh Schedule to the Act.⁶ The returning officer for the combined university constituency is the Vice-Chancellor of the University of Edinburgh.

SUBSECTION (2).—*Deputy Returning Officers.*

588. Any returning officer who is returning officer for more than one constituency, or who by sickness or unavoidable absence is incapacitated from performing any of the duties devolving upon him, may, without prejudice to any other power, by writing under his hand appoint a fit person to be his deputy for all or any of the purposes relating to an election, and may, by himself or such deputy, exercise any powers and do any things which the returning officer is authorised or required to exercise or do in relation to such election. Every such deputy shall, in so far as he acts as returning officer, be deemed to be included in the term returning officer in the provisions of the statutes relating to parliamentary elections, which are to be construed as one.⁷ There is no limitation on the number of deputy officers that may be appointed by the Sheriff. He may require to appoint one for each election where he is the returning officer. The death or disability of the returning officer subsequent to the issue of the notice of the election does not cancel any appointment made by him of a deputy or other official.⁸

589. In the event of no appointment of a deputy returning officer being made by a Sheriff incapacitated as aforesaid, or in the event of any

¹ *Thompson v. Pearce*, 1819, 1 B. & B. 25.

² *Tranton v. Astor*, 1917, 33 T.L.R. 383.

³ *Londonderry*, 1860, W. & Br. 206.

⁴ *In re Samuel*, [1913] A.C. 514.

⁵ 5 & 6 Geo. V. c. 7, s. 14 (2); 12 Geo. V. c. 10; 13 & 14 Geo. V. c. 31, s. 11.

⁶ 1918 Act, s. 43 (13).

⁷ *Ibid.*, s. 43 (13); 35 & 36 Vict. c. 35, s. 8.

⁸ 54 & 55 Vict. c. 4, s. 6.

vacancy in the office of Sheriff at the time when any of such duties require to be performed, the Sheriff-Substitute at the place at which the writ for the election is appointed to be received shall act as returning officer, and shall perform all the duties and have all the powers (including the power of appointing deputies) of such returning officer.¹

590. The returning officer and any deputy returning officer require to take the oath of secrecy.²

SECTION 4.—DIVISION OF CONSTITUENCY INTO POLLING DISTRICTS.

591. The returning officer has the duty as occasion requires to divide the constituency into polling districts and to appoint polling places for these districts in such manner as to give to all electors in the constituency such reasonable facilities for voting as are practicable in the circumstances.³ In delineating polling districts it has to be kept in view that as the register is made up not only for parliamentary but also for local government purposes it is desirable to make the areas for one purpose coterminous with one or more areas for the other purpose. As the electors list in the form in which a new register of voters is to be framed is published annually on 8th August, it is desirable that any alterations in polling districts should be made if possible prior to that date, in order that they may be given effect to in the new register. In fixing polling stations, schools receiving grants, a Sheriff Court or municipal buildings, or any room the expense of which is payable out of any local rate may be taken free of charge.⁴

592. If a local authority, defined as the council of any county, borough, urban or rural district, or parish wholly or partly situated in the constituency, or not less than thirty electors in the constituency, make a representation to the Lord Advocate that the polling districts or polling places do not meet the reasonable requirements of the electors in the constituency, or of any body of electors, the Lord Advocate shall consider the representation, and may, if he thinks fit, direct the returning officer for the constituency to make such alterations as the Lord Advocate thinks necessary in the circumstances; and if the returning officer fails to make these alterations within a month after the direction is given, the Lord Advocate may himself make the alterations, and any alterations so made shall have effect as if they had been made by the returning officer.⁵

593. On any alteration in the division of polling districts or the appointment of polling places being made by the returning officer, he must send a report to the Lord Advocate and publish in the constituency a notice shewing the boundaries of any polling districts or the situation of any polling places so constituted.⁶

¹ 1918 Act, s. 43 (13).

² Ballot Act, Rule 51.

³ 1918 Act, s. 31 (1), 43 (17).

⁴ Ballot Act, s. 6; 54 & 55 Vict. c. 49, s. 5.

⁵ 1918 Act, s. 31 (2).

⁶ *Ibid.*, s. 31 (3).

SECTION 5.—THE WRIT.

SUBSECTION (1).—*How issued.*

594. The writ of election is the warrant for the election of a member of Parliament being held. The procedure in the issue of a writ is different according to circumstances. At a general election, a Royal Proclamation is made dissolving the old Parliament and summoning the new one, and the Lord Chancellor is ordained by an Order in Council to direct the clerk of the Crown in Chancery to issue writs for that purpose.¹ The time appointed for the meeting of the new Parliament may be any time not less than twenty clear days after the proclamation summoning it. In the case of a by-election, on a particular vacancy occurring the writ is issued on the warrant of the Speaker (1) during session on a resolution of the House of Commons; and (2) during a recess on certification of the vacancy, and that it has been caused by (a) a member accepting an office of profit under the Crown which vacates his seat, except the Chiltern Hundreds; (b) his elevation or succession to the peerage; (c) his death; (d) his having been certified a lunatic; or (e) his being adjudicated a bankrupt, and after six days' notice in the *London Gazette*. The Speaker, however, does not during the recess grant a warrant, unless the application for it is made so long prior to the next meeting of the House of Commons for the transaction of business as that the writ may be issued before such meeting.²

595. In every case, the writ in the statutory form is addressed to the returning officer of the constituency, by whom it is returnable to the clerk of the Crown in Chancery on the completion of the election.³ A separate writ is issued for the election of a member for each constituency, with the exception of Dundee, the only constituency returning two members jointly, and the Universities constituency returning three members, where one writ is issued in each case.

SUBSECTION (2).—*Transmission and Receipt of Writ.*

596. The writ is sent to the postmaster nearest to the address which the returning officer is required annually to furnish to the Postmaster-General as that to which writs are to be directed.⁴ The writ is delivered by the postmaster to the returning officer or deputy returning officer or to the Sheriff-Substitute. The officer receiving the writ must give the postmaster delivering it a receipt in writing setting forth the day and hour the writ was delivered to him.⁵ The returning officer or deputy returning officer endorses on the writ a receipt with the date of the receipt.

¹ 1918 Act, s. 21 (3).

² 24 Geo. III. c. 26, ss. 5 and 6; 21 & 22 Vict. c. 110, ss. 3 and 5; 46 & 47 Vict. c. 53, s. 33.

³ Ballot Act, s. 2, Second Schedule.

⁴ 53 Geo. III. c. 8, s. 1.

⁵ 5 & 6 Will. IV. c. 78, s. 11.

SECTION 6.—NOTICE OF ELECTION.

SUBSECTION (1).—*When Notice must be given.*

597. The returning officer must in the case of a county election within two days after the day on which he receives the writ and in the case of a borough election on the day on which he receives the writ, or on the following day, give public notice between the hours of 9 a.m. and 4 p.m. of the day on which and the place at which he will proceed to an election, and of the time appointed for the election, and of the day on which the poll will be taken in case the election is contested, and of the time and place at which forms of nomination papers may be obtained.¹ The expression day of election is apt to mislead. Except when the election is uncontested it is in reality the day of nomination. The scheme of the Ballot Act is that the election initiated on the day fixed is continued during the subsequent procedure until the declaration of the poll, as in the event of more candidates being nominated than there are vacancies the returning officer is directed to "adjourn the election." The notice is given in the form specified in the Ballot Act, 1872.² The dates and other information stated therein must be fixed in accordance with the statutory provisions.

SUBSECTION (2).—*Day and Time of Election and of Poll.*

598. In the case of a general election, the day of election (*i.e.* nomination) must be the eighth day after the date of the proclamation declaring the calling of a new Parliament, and the poll shall take place on the ninth day after the day fixed for the election, *i.e.* nomination.³ Accordingly all polls take place on one and the same day. In the case of a by-election for a county or district of boroughs the day of nomination appointed by the returning officer must not be later than the ninth day after the receipt of the writ, with an interval of not less than three clear days between the day on which notice is given and the day of nomination.⁴ In the case of a by-election in a burgh, the day of nomination fixed must not be later than the seventh day after the receipt of the writ, with an interval of not less than two clear days between the day on which notice is given and the day of nomination.⁵ In the case of a by-election the poll must take place on such day as the returning officer may appoint, not being less than six or more than eight clear days after the date fixed for nomination.⁶ In these calculations, as in all other calculations under the election statutes, Sunday, Christmas Day, Good Friday, and any day set apart for a public fast or thanksgiving, shall be excluded; and whenever

¹ Ballot Act, 1872, 35 & 36 Vict. c. 33, First Schedule, Rule 1.

² Schedule II.

³ 1918 Act, Second Schedule.

⁴ Ballot Act, Rule 2.

⁵ 10 & 11 Geo. V. c. 35, s. 3 (a).

⁶ *Ibid.*, s. 3 (b).

anything is required to be done on any day which falls on these days, such things may be done on the next day.¹

SUBSECTION (3).—*Hours of Nomination.*

599. The time appointed for nomination shall be any two hours between 10 a.m. and 3 p.m. the returning officer may determine.²

SUBSECTION (4).—*Place of Election.*

600. The place of election (*i.e.* nomination) is fixed for a convenient room situated in the place appointed by the Secretary of State for Scotland.³

SUBSECTION (5).—*Forms of Nomination.*

601. The place where nomination papers may be obtained—usually the sheriff-clerk's office—and also the time when they can be obtained, which must be fixed by the returning officer at any two hours between 10 a.m. and 2 p.m. on each day intervening between the publication of the notice and the day of election (*i.e.* nomination),⁴ must also be inserted in the notice of election.⁵ A mistake in the notice will invalidate an election if it affected the result.⁶

SUBSECTION (6).—*Publication of Notice.*

602. The notice must be given between 9 a.m. and 4 p.m. on the dates specified, according to whether it is a general election or a by-election, and if a by-election whether for a county or district of burghs or for a burgh.⁵ In the case of every election for a county (which is presumed to include a district of burghs) the returning officer must send one of the notices by post under cover to the postmaster of the principal post office of each polling place in the county, endorsed with the words "Notice of Election," and the same shall be forwarded free of charge, and the postmaster receiving the same must forthwith publish the same in the manner in which post office notices are usually published.⁵ The notice otherwise, like all other notices in connection with an election, may be published by advertisement, handbills, placards, or in any other way in the discretion of the returning officer.

SECTION 7.—PROCEDURE ON DAY OF ELECTION.

SUBSECTION (1).—*Nomination.*

603. On the nomination day and during the hours and at the place appointed the returning officer or deputy returning officer attends to

¹ Ballot Act, Rule 56.

² *Ibid.*, Rule 4.

³ 1918 Act, s. 43 (16).

⁴ Ballot Act, Rule 7.

⁵ *Ibid.*, Rule 1.

⁶ *East Clare* 1892, Day's El. Cas. 161; 4 O'M. & H. 164.

receive nominations of candidates, and for one hour after to receive and dispose of objections to any nomination.¹ The nomination paper must be delivered to the returning officer by the candidate or by his proposer or seconder, and no other person than these and one other person selected by the candidate is entitled to attend the proceedings except those attending for the purpose of assisting the returning officer.² It is not necessary that the candidate should be accompanied by any person. It is sufficient if he delivers the nomination paper duly signed himself.³ But delivery by an agent is bad.⁴

604. On the nomination paper being delivered to the returning officer he must forthwith publish the name of the person nominated as a candidate, and the names of his proposer and seconder, by placing them in a conspicuous position outside the building where the nominations are received.⁵ This should be done immediately on the receipt of each nomination paper.

605. The nomination paper must be in writing in the prescribed statutory form,⁶ but not necessarily on one of the nomination papers provided by the returning officer. The candidate must be described in the nomination paper in such manner as in the opinion of the returning officer is calculated sufficiently to identify such candidate; the description must include his name, his abode, and his rank, profession, or calling, and his surname shall come first in the list of his name.⁷ The accuracy of this information is important, as it determines the particulars of the candidate's name and designation on the ballot paper, and also the indorsement on the writ of the successful candidate. The nomination paper must be subscribed by two registered electors of the county or borough for which the person is a candidate as proposer and seconder, and by eight other registered electors of the same county or borough as assenting to the nomination.⁸ The nomination paper must be fully filled in before being signed by anyone, and where the name of a different proposer was inserted afterwards the paper was held bad.⁹

606. Each candidate must be nominated by a separate nomination paper,¹⁰ but the same electors or any of them may subscribe as many nomination papers as there are vacancies to fill, but no more. To avoid the danger of having a nomination declared void, it is a common practice to nominate the same candidate more than once, with, in each case, a different proposer and seconder and assenters. In each case a separate nomination paper must be used. A bad nomination cannot void a good nomination of the same person.¹¹

¹ Ballot Act, Rules 4, 12.

² *Ibid.*, Rule 8.

³ *Davies v. Lord Kensington*, 1874, L.R. 9 C.P. 723.

⁴ *Monks v. Jackson*, 1876, 1 C.P.D. 683.

⁵ Ballot Act, Rule 11.

⁶ *Ibid.*, Rule 7, and Second Schedule.

⁷ *Ibid.*, Rule 6.

⁸ *Ibid.*, s. 1.

⁹ *Harmon v. Park*, 1881, 7 Q.B.D. 369.

¹⁰ Ballot Act, Rule 5.

¹¹ *Northcote v. Pulsford*, 1874, L.R. 10 C.P. 476.

SUBSECTION (2).—*Objection to Nomination.*

607. The returning officer is to decide on any objection to the nomination paper, and his decision, if against the objection, is final, but if in favour of it, is subject to reversal on a petition questioning the election or return.¹ The returning officer's duty is limited to objections made to the nomination paper itself. He has no jurisdiction to determine any question as to the qualification of a candidate, which is determined on an election petition alone.² Any objection on the ground of insufficiency of description must be made or taken by the returning officer himself or any other objector, immediately after the delivery of the nomination paper.³ But other objections may be stated or taken later. The only other objection he can entertain and consider is that one or other of the proposer, the seconder, and the eight assenters, is not a registered parliamentary elector in the constituency. But he should reject any nomination paper which is, on the face of it, a mere abuse of the right of nomination, *e.g.* if it purposes to nominate a deceased sovereign.⁴

SUBSECTION (3).—*Deposit by Candidate.*

608. As soon as a candidate is nominated, and during the time appointed for the election (*i.e.* the nomination), a candidate must deposit or cause to be deposited with the returning officer the sum of £150—either by any legal tender or with consent of the returning officer in any other manner, *e.g.* by cheque—and if he fails to do so he is deemed to be withdrawn within the provisions of the Ballot Act, 1872.⁵ If after the deposit is made the candidate is withdrawn under s. 1 of the Ballot Act, 1872, the deposit is to be returned to the person who made it, and if the candidate dies after it is made, and before the commencement of the poll, the deposit is to be returned to his legal personal representative or to the person who made it.⁶ A question may arise as to whether the date of commencement of the poll counts from the time of the issue of the ballot papers to the absent voters.

609. If the candidate is not elected and does not poll more than one-eighth of the votes polled in the case of a constituency returning one or two members, or than one-eighth of the poll divided by the number of seats in a constituency returning more than two members, the deposit is forfeited to the Crown.⁷ The number of votes polled is to be the number of ballot papers counted other than spoilt ballot papers, which are not counted, and in case of a transferable vote (which is confined to the Universities election) the number of votes polled is to be the number of first preferences.⁸ In any other case, the deposit

¹ Ballot Act, Rule 13.

² *Pritchard v. Mayor of Bangor*, 1888, 13 App. Cas. 241, at p. 257.

³ Ballot Act, Rule 6.

⁴ *Harewood v. Linksey*, [1899] 1 Q.B. 852, at p. 862.

⁵ 1918 Act, s. 26 (1), (2).

⁷ *Ibid.*, s. 27 (1).

⁶ *Ibid.*, s. 26 (3).

⁸ *Ibid.*, s. 27 (2).

is to be returned to the candidate as soon as he has taken the oath as a member, if elected, and if not, as soon as practicable after the result is declared.¹ Evidence of a member having taken the oath is given by a copy of the Votes and Proceedings of the House of Commons recording the fact.

610. No provision is made for the case of a person who, after election and before taking his seat and oath, succeeds or is elevated to the peerage, or the case of a person who, although elected, does not take his seat during the lifetime of the Parliament to which he has been elected. The latter question arose following the election held in May 1921 of the first Parliament of Southern Ireland, which was dissolved in 1922. Eight candidates who had been elected unopposed to the Parliament of Southern Ireland had, in consequence of their refusal to take the prescribed oath, failed to take their seats during the duration of the Parliament. After the dissolution, in an action by one of these candidates for repayment of his deposit from the returning officer, it was held that he was entitled to recover on the ground that the resulting trust for the candidate on whose behalf the money had been deposited had come to an end.²

611. Where a candidate is nominated at a general election in more than one constituency, he shall in no case recover his deposit more than once, and in such case the deposits shall be forfeited to His Majesty, except such one as the Treasury shall direct to be returned to the candidate.¹

SUBSECTION (4).—*Withdrawal of a Candidate.*

612. During the time appointed for the election (*i.e.* nomination), but not afterwards, a candidate may withdraw from his candidature by giving a written notice of such withdrawal, signed by him and delivered to the returning officer. The candidature of a candidate nominated in his absence out of the United Kingdom may be withdrawn within the same period by a written notice signed by the proposer of such candidate, delivered to the returning officer, together with a written declaration of such absence of the candidate.³ Any person who corruptly induces or procures any other person to withdraw from being a candidate, in consideration of any payment or promise of payment, is guilty of an illegal practice, as is also the person withdrawing.⁴

613. If any candidate is withdrawn, the returning officer must give public notice of the name of such candidate, and also of the names of the persons who subscribed his nomination paper, as well as of the candidates who stood nominated or were elected.⁵ A candidate whose candidature is impliedly withdrawn by his failure timeously to make the requisite deposit will be included in this notice.

¹ 1918 Act, s. 27 (1).

² Ballot Act, s. 1.

⁵ Ballot Act, Rule 10.

² *O'Donoghue v. Roche*, [1927] I.R. 152.

⁴ 46 & 47 Vict. c. 51, s. 15.

SUBSECTION (5).—*Extension of the Hours of Polling.*

614. Where any candidate at a parliamentary election, or a candidate's agent on his behalf, gives notice in writing to the returning officer during the nomination time or within one hour afterwards that he wishes the poll at that election—

- (a) to commence at seven o'clock in the forenoon, or
- (b) to be kept open till nine o'clock in the afternoon, or
- (c) to commence at seven o'clock in the forenoon and be kept open till nine o'clock in the afternoon,

the hour specified in any such notice, whether as respects the commencement or close of the poll, will be substituted for eight o'clock in the forenoon or eight o'clock in the afternoon, as the case may be, as the hours at which the poll shall open and be kept open.¹ Any notice given by a candidate shall not be of any effect if the candidate is withdrawn or deemed to be withdrawn under the provisions of the Ballot Act.² The returning officer has no discretion, but must give effect to the notice. The withdrawal of a candidate who has given notice, whether express or implied, may seriously affect other candidates who have relied upon the notice given by the withdrawing candidate and have not themselves given notice.

SUBSECTION (6).—*Election or Adjournment for Poll.*

615. If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up, the returning officer must forthwith declare the candidate or candidates nominated to be elected, but if there are more candidates nominated than there are vacancies, the returning officer must adjourn the election and take a poll in manner in the Ballot Act mentioned.³

SECTION 8.—NOTICE OF POLLING DAY AND CANDIDATES.

SUBSECTION (1).—*Form of Notice.*

616. The returning officer must as soon as practicable after adjourning the election give public notice of the poll.⁴ It must contain notice

- (a) of the date on which the poll is to be taken. This gives anew the information already given;
- (b) of the hours fixed for the opening and closing of the poll. These will be 8 a.m. to 8 p.m. unless a candidate has applied for an extension, when they will be 7 a.m. to 9 p.m. or 8 a.m. to 9 p.m. or 7 a.m. to 8 p.m., as the case may be;
- (c) of the candidates described as in their nomination papers;

¹ 3 & 4 Geo. V. c. 6, s. 1 (1).

² *Ibid.*, s. 1 (3).

³ 1918 Act, Schedule V., Rules 6 and 7.

⁴ Ballot Act, Rules 9, 10, and 22; 3 & 4 Geo. V. c. 6, s. 1 (2).

- (d) of the names of the persons who subscribe the nomination paper of each candidate, which will include assenters;
- (e) of the order in which the names of candidates will be printed in the ballot papers. The names are arranged alphabetically in the order of the surname of the candidate;
- (f) of the names of any candidates who have withdrawn;
- (g) of the names of the persons who subscribed the nomination papers of the candidates who have withdrawn; this will include the assenters.

This notice will be published by advertisement, bills, and placards, as the returning officer may direct.

SUBSECTION (2).—*Telegraphic Notice of Poll.*

617. In the case of an election for a county or division of a county, and it is thought also for a district of burghs, and in practice is so interpreted, the returning officer must sign a form for transmission by telegram containing the names of the candidates nominated, and stating the day on which the poll is to be taken, and also the hours fixed for the opening and close of the poll, if these have been extended. This notice must be handed to the postmaster of the head office in the town where the election is held, who is required to forward it free of charge to all the postal telegraph offices in the constituency, and it is to be published at each such office forthwith in the same way as post-office notices are usually published.¹

SECTION 9.—ABSENT VOTERS VOTING BY POST.

SUBSECTION (1).—*Method of Issue of Ballot Papers.*

618. At a contested election, the returning officer must, as soon as practicable after the adjournment of the election, send a ballot paper to each person entered on the absent voters list at the address recorded by the registration officer, together with a declaration of identity, except in the case of a person (1) who has granted a proxy, or (2) whose recorded address is not in the United Kingdom.² The ballot paper marked by the absent voter, accompanied by the declaration of identity duly signed and authenticated, shall, if it is received by the returning officer before the close of the poll, be counted by him and treated for all purposes in the same manner as a ballot paper placed in the ballot box in the ordinary manner.³

619. As the interval between the adjournment of the election and the day of the poll is limited, it is desirable, if absent voters are to have a reasonable opportunity of returning their voting papers timeously, that the issue of absent voters' papers should be made by the returning officer, if possible on the day of adjournment or not later than the

¹ Ballot Act, Rules 9, 10, and 22; 3 & 4 Geo. V. c. 6, s. 1 (2).

² 1918 Act, s. 23 (1).

³ *Ibid.*, s. 23 (2).

following day. To expedite matters the usual practice is, with the sanction of the Treasury, for the returning officer to make the necessary arrangements in advance for an issue, and to adjust with the agents of probable candidates a provisional ballot paper and have it set up in type prior to the day of nomination, so that it may be immediately printed off after the nomination is closed. Orders in Council have been made as provided in the Act, prescribing the method in which ballot papers are to be sent to the voter for the purpose of voting by post and as to the authentication of marked ballot papers, and generally for the purpose of carrying into effect the provisions of the statute and for preserving the secrecy of voting in pursuance thereof.¹

620. The returning officer, not later than the day of nomination of candidates, is to give the election agent of each candidate notice of the time and place at which he will issue the ballot papers, and of the number of persons each agent may appoint to attend the said issue. Where any subsequent issue of ballot papers is made, the returning officer is to give a similar notice as soon as practicable.²

621. Each ballot paper issued is to be marked on both sides with the official mark either stamped or perforated, and the number, name, and description of the elector as stated in the absent voters list must be called out, and such number must be marked on the counterfoil, and a mark must be placed in a copy of the absent voters list against the number of the elector to denote that a ballot paper has been issued to the elector, but without showing the particular ballot paper issued to him.³ The number of the ballot paper is to be marked upon the form of declaration of identity.⁴

622. The returning officer must send, in an envelope addressed to the absent voter at the recorded address,—

- (a) the ballot paper;
- (b) the form of declaration of identity;
- (c) an envelope addressed to the returning officer (hereinafter referred to as a “covering envelope”);
- (d) a smaller envelope marked “ballot paper envelope” bearing the number of the ballot paper.⁵

The envelopes are to be in the respective forms prescribed.⁶

623. Special regulations have been made regarding the absent voters addresses in the Naval, Military, and Air Services, and are given effect to in the recorded addresses in the absent voters list by the registration officer and should be strictly adhered to. Any abbreviation of the address will cause delay in the transmission of the ballot papers. The addresses on the envelopes to be sent to men in the Army and Air Force should show the army or official number, rank, name, unit, and corps in that order, and the location thus: 3578, Sergt. B. Brown, 2nd Scots Guards, Caterham Valley, Surrey. Where in special cases an airman

¹ 1918 Act, s. 23 (6).

² R.P. 134, Rule 23 (1).

³ *Ibid.*, Rule 23 (2).

⁴ *Ibid.*, Rule 23 (3).

⁵ *Ibid.*, Rule 23 (4).

⁶ *Ibid.*, Schedule IV., Nos. II., III., and IV.

has a more detailed address, the full address so given should be entered on the envelope. As regards men in the Navy, the order of the service particulars should be name, rating, official number, ship, or establishment. Where the location of the ship or establishment is given, the envelopes should be addressed accordingly, but in all other cases the envelope should be simply addressed as in the following example: J. L. Hannay, Ldg. Smn., No. 16554, H.M.S. Benbow, c/o G.P.O. In the case of naval voters serving in tenders the Admiralty desire that the ballot papers should be sent direct to the tender and not *via* the parent ship. In such cases the envelope forwarding the ballot paper should be addressed thus: H.M.S. Spender, c/o G.P.O. Ballot papers for naval voters cannot be sent to any address in the Irish Free State as it is not a part of the United Kingdom, or to any of H.M. ships located in Irish Free State waters.

624. The addresses of officers of the Territorial Force, when embodied, are furnished by the Record Offices to and recorded by the registration officer in the absent voters list, but may be supplemented by direct information from the officers themselves. Naval officers and officers of the Army and Air Force must furnish their own addresses to the registration officer. In the case of an officer in the Navy, the name of the ship, followed by "c/o G.P.O." is a sufficient address, but in the case of the Army and Air Force, the Post Office cannot accept postal communications to the unit if its location is not given, and no ballot paper should be despatched to an officer with the unit only as the address. When information as to the location of the unit is not available, the ballot paper envelope may be addressed to the qualifying address of the officer.

625. Where a returning officer is satisfied that two or more entries in the absent voters list for a constituency relate to the same person, he shall not issue more than one ballot paper in respect of those entries.¹

626. All envelopes addressed to the absent voters are to be counted and forthwith delivered by the returning officer to the nearest head post office, or such other office as may be arranged with the head postmaster, and the postmaster must stamp with the post-office date stamp a form of receipt to be presented by the returning officer stating the number of envelopes so delivered, and must immediately forward such envelopes for delivery to the persons to whom they are addressed.² In order to facilitate the transmission of the ballot papers it is desired by the Postmaster-General that the ballot paper envelopes which are addressed "c/o G.P.O." may be handed over separately from the other addresses in the United Kingdom, tied up in convenient bundles and arranged according to each ship.

627. Where an envelope containing a ballot paper and the other documents referred to above is returned to the returning officer as not having been delivered to an absent voter, the returning officer may

¹ R.P. 134, Rule 23 (5).

² *Ibid.*, Rule 23 (6).

readdress the envelope to any address to which he could send a ballot paper for that voter if he were then sending it for the first time.¹

SUBSECTION (2).—*Sealing up Absent Voters List.*

628. The returning officer as soon as practicable after the completion of the issue of the ballot papers, and in the presence of the agents, must make up in separate packets, sealed with his own seal and sealed by such of the agents as desire to apply their seals, the marked copy of the absent voters list and the counterfoils of the ballot papers. Where any subsequent issue of ballot papers is made the sealed packet containing the marked copy of the absent voters list may be opened by the returning officer for the purposes of that issue, and on completion of that issue the list and the counterfoils of the ballot papers at that issue shall be made up and sealed as above.²

SUBSECTION (3).—*Form of Ballot Paper and Declaration of Identity.*

629. The ballot papers to be sent to absent voters are to be in the same form as, and indistinguishable from, the ballot papers delivered to other voters. The declaration of identity sent with the ballot paper is to be in Form No. I. set out in Schedule IV. to the Order, or in a form to the like effect, and to have printed on the back thereof the instructions to the voter set out in that schedule.³ The declaration of identity contains a declaration that the voter signing is the person to whom the ballot paper numbered as stated and the envelope in which it was enclosed produced by him were sent, and is subscribed by a witness who authenticates the identity of the declarant and his signature. The instructions to the voter, after specifying the manner in which the declaration of identity is to be subscribed and verified and giving directions for voting, instruct him (1) to place the marked ballot paper in the ballot paper envelope and fasten it up, (2) to place the ballot paper envelope, together with the declaration of identity, in the covering envelope addressed to the returning officer and despatch the same by post without delay.

SUBSECTION (4).—*Presence of Agents.*

630. The returning officer, his assistants and clerks, the election agent of each candidate or some person appointed by such election agent, and no other person, may be present on the issue of ballot papers, and on the opening of the absent voters ballot boxes and the envelopes contained therein. Where the ballot papers are to be issued, or the envelopes contained in the absent voters ballot boxes are to be opened, simultaneously in two or more batches, the election agent of each candidate may appoint such number of persons as he may be authorised

¹ R.P. 134, Rule 23 (7).

² *Ibid.*, Rule 29 (1).

³ *Ibid.*, Rule 19.

by the returning officer to appoint, not exceeding the number of such batches, to be present with him or on his behalf at such issue or opening: provided that no election agent shall be authorised by the returning officer to appoint a larger number of persons than any other election agent.¹ The expression agent as used in any order includes the election agent of a candidate and any person appointed by any such election agent to be present at the issue or opening of ballot papers, and ss. 4 and 11 of the Ballot Act, 1872, are to apply with the necessary modifications to officers, assistants, clerks or agents, in attendance at the proceedings on the issue of ballot papers, or at the proceedings on the receipt of ballot papers.²

SUBSECTION (5).—*Provision of Absent Voters Ballot Boxes.*

631. The returning officer shall provide a ballot box or ballot boxes for the reception of the covering envelopes when returned by the voters. Every such ballot box shall be shewn open and empty to the agents present, and shall be sealed with the seal of the returning officer and the seals of such of the agents as desire to affix their seals, and shall be marked "absent voters ballot box" and with the name of the constituency, and the returning officer shall make provision for the safe custody of such ballot box.³

SUBSECTION (6).—*Proceedings on Receipt of Ballot Papers.*

632. The returning officer must, immediately on receipt of covering envelopes, place them unopened in the absent voters ballot box.⁴ The usual procedure is for the postmaster, every morning betwixt the issue of the ballot papers and the day of polling, to hand over to the returning officer (1) the covering envelope, (2) the returned envelopes received, and to receive a receipt therefor. Only the covering envelopes are put into the absent voters ballot box. The returned envelopes are either reissued or retained by the returning officer. On the polling day it is arranged that, immediately before the hour fixed for the closing of the poll, the postmaster will make a special delivery of any covering envelopes received by him up to the latest time available in order that they may be placed in the absent voters box prior to the closing hour.

633. The absent voters ballot box must be opened by the returning officer in the presence of the agents before the time fixed for the counting of the votes.⁵ The opening cannot take place until after the closing of the poll. The returning officer must give the election agent of each candidate at least twenty-four hours' notice in writing of the time and place at which he will proceed to open the absent voters ballot boxes and the envelopes contained therein, and of the number of persons such agent may appoint to be present at the opening.⁶ At the time fixed,

¹ R.P. 134, Rule 20.

⁴ *Ibid.*, Rule 25.

² *Ibid.*, Rule 18.

⁵ *Ibid.*, Rule 26 (1).

³ *Ibid.*, Rule 24.

⁶ *Ibid.*, Rule 26 (2).

the returning officer will see that all the parties assembled have taken the declaration of secrecy.

634. Before proceeding to open the absent voters ballot box, the returning officer will shew a ballot box open and empty to the agents present, and thereafter close and seal this ballot box with his own seal and the seals of such of the agents as desire to affix their seals and mark it "absent voters ballot box" and with the name of the constituency.¹

635. When an absent voters ballot box has been opened, the returning officer is to count and note the number of envelopes, and must then open each covering envelope separately, examine the declaration of identity, and compare the number thereon with the number on the ballot paper envelope.² If the numbers agree and the declaration of identity is found to be duly signed and authenticated, he must place the declaration of identity and the ballot paper envelope in separate receptacles.³ If he is not satisfied that the declaration of identity has been duly signed and authenticated he must endorse the declaration of identity "vote rejected" and must attach thereto the ballot paper envelope, without opening such envelope, or, if there is no such envelope, the ballot paper.⁴ If he finds that the numbers on the declaration of identity and on the ballot paper envelope do not agree, or if the envelope has no number on it, he is to open the envelope, and if the number on the ballot paper agrees with the number on the declaration of identity he shall place the ballot paper in the ballot box already sealed and labelled "absent voters ballot box."⁵ In every case in which the number on the ballot paper does not agree with the number on the declaration of identity, he must replace the ballot paper in its envelope (if any), attach such envelope or ballot paper as the case may be to the declaration of identity, and endorse the declaration of identity "vote rejected."⁶ Where a declaration of identity does not appear to accompany the ballot paper envelope, the returning officer must open the envelope, and if it is found to contain the declaration of identity he is to deal with such declaration and ballot paper in accordance with the rules above stated.⁷ Any declaration not accompanied by a ballot paper, and any ballot paper not accompanied by a declaration of identity, must be marked "rejected."⁸ Where a ballot paper and declaration of identity are received together and the numbers thereon agree, the ballot paper is not to be rejected solely on the ground of non-compliance with the instructions to the voter as to the envelopes in which they are to be placed in sending them to the returning officer.⁹

636. The returning officer shall shew to the agents any declaration of identity which he proposes to reject on the ground that it has not been properly signed and authenticated, and if an objection is made by any agent to his decision shall add to the endorsement the words "rejection objected to." The returning officer shall keep all rejected

¹ R.P. 134, Rules 24 (2) and 28 (2).

⁴ *Ibid.*, Rule 26 (5).

⁷ *Ibid.*, Rule 26 (8).

² *Ibid.*, Rule 26 (3).

⁵ *Ibid.*, Rule 26 (6).

⁸ *Ibid.*, Rule 26 (9).

³ *Ibid.*, Rule 26 (4).

⁶ *Ibid.*, Rule 26 (7).

⁹ *Ibid.*, Rule 26 (10).

declarations, with the attached envelopes or ballot papers as the case may be, separate from other documents.¹

637. When the covering envelopes in any absent voters ballot box have been opened and their contents dealt with as above, the returning officer shall open each unopened ballot paper envelope and compare the number on the envelope with the number on the ballot paper. If the numbers agree he shall place the ballot paper in the absent voters ballot box previously shewn and sealed. If the numbers do not agree he shall mark the ballot paper "rejected" and shall attach it to the envelope. The absent voters ballot box is thereafter treated as a ballot box returned by a presiding officer for the purpose of Rule 34 in Part I. of the First Schedule to the Ballot Act, 1872.² The number of ballot papers placed in the absent voters box will be verified, as it will fall to be included in the verification sheet at the opening of the ballot boxes at the count.

638. The returning officer must seal up in separate packets (1) the declarations of identity which accompanied any ballot papers duly accepted, (2) any rejected declarations of identity, and (3) any rejected ballot papers; in the two latter cases with the envelopes (if any) attached thereto.³ Where covering envelopes are received by the returning officer after the close of the poll, or where any envelopes addressed to absent voters are returned as undelivered, the returning officer is not to open such envelopes and must (subject to any power of readdressing the same) seal them up into separate packets.⁴

SECTION 10.—PROVISION OF POLLING STATIONS AT POLLING PLACES.

639. The returning officer must provide a sufficient number of polling stations for the accommodation of the electors to vote at each polling place, and shall distribute the stations amongst those electors in such a manner as he thinks most convenient, provided that in a district of burghs there shall be at least one polling station at each burgh comprised in the constituency. As the returning officer has to give publication of the situation of polling stations immediately after the nomination, he requires to make tentative arrangements thereto, if a contest is probable.

640. The returning officer may use free of charge for the purpose of a polling station any Sheriff Court and municipal buildings, and any room in a school receiving a grant out of moneys provided by Parliament, and any room the expense of maintaining which is payable out of any local rate, without any charge beyond what is necessary to defray any expense incurred or damage done by so doing, and the use of any room in an unoccupied house shall not render any person liable to be rated or pay any rate for such house.⁵

¹ R.P. 134, Rule 27.

² *Ibid.*, Rule 28.

³ *Ibid.*, Rule 29 (2).

⁴ *Ibid.*, Rule 29 (3).

⁵ Ballot Act, s. 6; 54 & 55 Vict. c. 49, s. 5.

SECTION 11.—EQUIPMENT OF POLLING STATIONS.

641. The returning officer must provide polling stations with voting compartments, ballot boxes, ballot papers, materials for marking ballot papers, stamping instruments, copies of the register or such part thereof as contains the names of the voters allotted to vote at each station, declarations of secrecy, declarations for illiterates, and everything necessary for the conduct of the poll.¹

SUBSECTION (1).—*Voting Compartments.*

642. Each polling station is to be furnished with such a number of compartments, in which the voters can mark their votes, screened from observation, as the returning officer thinks necessary, so that at least one compartment is provided for every 150 electors.² It has been held that voting compartments which did not wholly enclose the electors, if so constructed as to afford voters, if ordinarily careful, reasonable facilities for marking their papers in secret sufficiently complied with the statutes.³

SUBSECTION (2).—*Ballot Boxes.*

643. The ballot boxes must be so constructed that the ballot papers can be introduced therein but cannot be withdrawn therefrom without the box being unlocked.⁴ These and other equipment are in practice supplied to the returning officer by H.M. Stationery Office, but the duty and responsibility is still incumbent upon the returning officer to see that the requirements of the statute are complied with and he will be liable for any failure to do so.⁵ The returning officer so far as practicable is to make use of ballot boxes, fittings, and compartments provided for county council, municipal, or educational elections, and of Sheriff Court and municipal buildings, and the authorities in possession thereof shall be bound to allow such use, without any charge beyond what is necessary to make good damage done.⁶ An election was held void owing to a returning officer omitting to provide sufficient ballot boxes, resulting in no poll being taken at two of the polling places and delay at several other places.⁷

SUBSECTION (3).—*Ballot Papers.*

644. The ballot papers to be provided are of two kinds, the ordinary ballot papers and special ballot papers, only different from the ordinary ballot papers in colour, for tendered votes.⁸ There must be for each station a number of ordinary ballot papers equal to the total number of voters entitled to vote there. Every ballot paper must contain a

¹ Ballot Act, Rules 16 and 20.

² *Nicolson v. Mags. of Wick*, 1922 S.C. 374.

³ *Hackney*, 1874, 2 O'M. & H. 77; *affd. Davies v. Lord Kensington*, 1874, L.R. 9 C.P. 723.

⁶ 54 & 55 Vict. c. 49, s. 5.

⁷ *Hackney, supra.*

² *Ibid.*, Rule 16.

⁴ Ballot Act, Rule 23.

⁸ Ballot Act, Rule 27.

list of the candidates, described as in their nomination papers, and arranged alphabetically in the order of their surnames; if two or more candidates have the same surname, then in the alphabetical order of their other names. It must be in the form set forth in the Second Schedule to the Ballot Act or as near thereto as circumstances admit, and must be capable of being folded up.¹ Each ballot paper must have a number printed on the back, and have attached a counterfoil with the same number printed on the face.²

645. Nothing is to be printed on the ballot paper except in accordance with the schedule.³ The surname of each candidate, and if there are two or more candidates of the same name also the other names of such candidates, shall be printed in large characters as shewn in the form, and the names, addresses, and descriptions and the number on the back of the paper shall be printed in small characters. Where the name of a candidate, who had withdrawn, was retained on the ballot paper the election was held to be avoided.⁴

SUBSECTION (4).—*Stamping Instruments.*

646. The stamping instruments must have the official secret mark of the returning officer fixed by him for each election. An interval of not less than seven years must intervene between the use of the same official mark at an election for the same county or borough.⁵

SUBSECTION (5).—*Presiding Officers and Clerks.*

647. The returning officer appoints presiding officers to preside and clerks to attend at the polling stations, called poll clerks, and also clerks to assist in the issuing of the absent voters papers and in the counting of the votes.⁶ No person who has been employed by anyone about the election can be appointed, and no poll clerk nor his partner or clerk may act as agent for a candidate.⁷ They must take the oath of secrecy.⁸ The returning officer may himself act as a presiding officer.

SECTION 12.—POWERS AND DUTIES OF PRESIDING OFFICERS AND CLERKS.

SUBSECTION (1).—*General Powers and Duties.*

648. Every presiding officer has all the powers of a deputy returning officer with respect to the poll, and every clerk appointed by the returning officer to assist him may discharge all the duties which the presiding officer is authorised to do, except ordering the arrest, exclusion or ejection

¹ Ballot Act, Rule 22.

² *Ibid.*, s. 2.

³ *Ibid.*, Second Schedule.

⁴ *Wilson v. Ingham*, 1895, 64 L.J. Q.B. 775.

⁵ Ballot Act, Rule 20.

⁶ *Ibid.*, s. 10.

⁷ *Ibid.*, Rule 49.

⁸ *Ibid.*, Rule 54.

from the polling station of any person.¹ Anyone is eligible to be appointed either as presiding officer or clerk, except a person who has been acting for any of the candidates during the existing election, or whose partner, clerk, or employer has been so acting, or who has been employed by any person in or about the election.²

649. Before entering upon their duties, every presiding officer and his clerk must make the declaration of secrecy prescribed by the Ballot Act in the presence of a Justice of the Peace or of the returning officer.³ Every presiding officer is provided by the returning officer, usually on the day prior to the poll, with the ballot box and other requisite articles for conducting the poll, which he should check on receipt, and retain in a place of safe custody. He should provide himself with a seal for sealing up the ballot box and other papers.

SUBSECTION (2).—*Duties before the Poll commences.*

650. The presiding officer and his clerk should be at the polling station at least twenty minutes before the hour fixed by the returning officer for the commencement of the poll, so that they may be ready to begin punctually. Failure to open the poll punctually may invalidate the election, if it is proved to have had an effect upon the result,⁴ and the presiding officer may be liable in damages for such breach of duty.⁵ The presiding officer should see (1) that the name of the polling station, and "directions to vote" are posted outside the polling station, and (2) that the directions for the guidance of the elector are posted inside each voting compartment and that pencils are fixed therein.

651. The presiding officer should determine the number of electors to be admitted into the polling station at any one time, which should not exceed the number of compartments in the station, and he should instruct the police constables accordingly, and that all other persons are to be excluded except (a) the candidates and their election agents and (b) one personation agent for each candidate for each polling station (*i.e.* presiding officer), who before his admission must produce authority to attend thereat as agent for the candidate, and must satisfy the presiding officer that he has taken the declaration of secrecy before the opening of the poll.

652. Just before the commencement of the poll, the presiding officer must show the ballot box empty to any persons present in the polling station so that they may see that it is empty, and then lock it up, and place his seal upon it in such a manner as to prevent the box being opened without breaking the seal affixed, and must keep it so locked and sealed, and placed in his view for the receipt of ballot papers.⁶

¹ Ballot Act, Rule 50.

² *Ibid.*, Rule 49.

³ *Ibid.*, Rule 54.

⁴ *Hackney*, 1874, 2 O'M. & H. 77; *Drogheda*, 1874, 2 O'M. & H. 201; *East Clare*, 1892, 4 O'M. & H. 162; *East Kerry*, 1910, 6 O'M. & H. 85.

⁵ *Pickering v. James*, 1873, L.R. 8 C.P. 489.

⁶ Ballot Act, Rule 23.

SECTION 13.—THE POLLING.

SUBSECTION (1).—*Persons to be allowed to Vote.*

653. No person is to be admitted to vote at any polling station except the one allotted to him.¹ To this rule there are two exceptions: (1) Where a police constable is, or is likely to be, on duty so as to prevent him from voting at his own polling booth or station in the constituency of which he is an elector, he may at any time, within seven days of the election, *i.e.* the polling day, obtain from and under the hand of the chief constable a certificate stating his name, his number in the police force, his number and description on the register of voters, and the fact that he is so sent or employed.² The presiding officer to whom such certificate is produced shall allow the constable to vote, and shall cancel the certificate, and put it up with the counterfoils of the used ballot papers.³ (2) Where an elector for any constituency is employed by the returning officer for that constituency for any purpose in connection with the election, under such circumstances as in the opinion of the returning officer would prevent him from voting at the polling station at which he would otherwise be entitled to vote, the returning officer may authorise him in the prescribed form⁴ to vote at any other polling station in the constituency, which is then to be treated as the station allotted to him under Rule 18 of the Ballot Act.⁵

654. The presiding officer will issue a ballot paper to the person presenting such certificate and allow him to vote if the certificate is in the prescribed form, and the person is a voter in the constituency. There is no express statutory direction regarding the disposal of the certificate as in the case of a constable, but it seems necessary that a similar course should be adopted and the certificate should be put up with the counterfoil of the used ballot paper. Unless this were done, in the event of a scrutiny there would be no means of identifying the voter, as there would be no register to refer to and nothing in substitution therefor.

SUBSECTION (2).—*Marking the Register.*

655. When an elector appears, the poll clerk (who should have before him the copy of the register of voters) will ascertain the elector's name and exact address, and should ascertain from the copy of the register of voters the number, name, and description of the elector as stated therein. Having found it he shall call out the number, name, and description of the elector as stated in the copy of the register, and put a mark in the register against the number of the elector to denote that he has received a ballot paper, but without showing the particular ballot paper which he has received.⁶ As there may be more than one person of the same name in the register, or the name may not be in its

¹ Ballot Act, Rule 18.³ *Ibid.*, s. 2 (2).⁵ 1918 Act, s. 24.² 50 Vict. sess. 2, c. 9, s. 2 (1).⁴ R.P. 134, s. 41, Schedule VIII.⁶ Ballot Act, Rule 24.

exact place in alphabetical order in the register, great care is required to secure accuracy. No misnomer or inaccurate description of a person or place on the register will prevent the voter being allowed to vote, provided he is so designated as to be commonly understood.¹

SUBSECTION (3).—*Numbering the Counterfoil.*

656. The presiding officer (who has before him the book containing the ballot papers) should, whenever the number of the elector is so called out, write the number on the counterfoil, and also the distinctive letter or sign and number, if any, of the polling district in which the elector is registered, or if he is entitled to be admitted to vote at a polling place of another district, the distinctive letter, or sign, or number if any, of such last-mentioned polling district, repeating the number aloud so as to ensure accuracy. He must then detach the ballot paper from the counterfoil; failure to do so will invalidate the ballot paper.² Care must be taken not to mark anything on the ballot paper itself except the official mark, otherwise the paper may be held void, as was the result of marking on the ballot paper the elector's number in the register.³

SUBSECTION (4).—*Stamping the Ballot Paper.*

657. The presiding officer shall then mark the ballot paper on both sides with the official mark.⁴ The ballot paper is then handed to the elector. When an embossing stamp is used, one impression will be sufficient, but when an inking stamp is used it must be applied to both sides of the paper.⁵ Great care must be taken in regard to this matter. A ballot paper not bearing the official mark cannot be counted. In England it has been held that a paper marked on the back only is a good vote.⁶ It has been further held that the presiding officer or clerk, as the case may be, is liable for any omission in issuing the ballot paper although there be no averment of malice or want of reasonable care on his part.⁷ The omission to stamp a ballot paper is very frequently due to a practice of stamping papers in advance, which is to be deprecated.

SUBSECTION (5).—*Method of Voting.*

658. The voter, on receiving the ballot paper, is to go into one of the compartments in the polling station, and having, without undue delay, secretly marked his vote on the paper by putting a cross thus—X—on the right-hand side of the paper opposite the name of the candidate or candidates for whom he wishes to vote, folded it up so as to

¹ 1918 Act, Schedule I., Rule 41.

² *East Clare*, 1892, 4 O'M. & H. 162.

³ *Deans v. Mags. of Haddington*, 1882, 9 R. 1077; *Woodward v. Sarsons*, 1875, L.R. 10 C.P. 733.

⁴ Ballot Act, Rule 24.

⁵ *Cirencester*, 1893, 4 O'M. & H. 194.

⁶ *Thornbury*, 1886, 16 Q.B.D. 739.

⁷ *Pickering v. James*, 1873, L.R. 8 C.P. 489.

conceal his vote, and shewn the official mark on the back thereof to the presiding officer, is to place it in the ballot box in the presence of the presiding officer, and then to quit the polling station.¹ It has been held that it is a statutory duty of the returning officer to see the official mark on the ballot paper before the voter deposits it in the ballot box. If after the voter has marked the ballot paper, and before depositing it in the ballot box, the presiding officer detects that the official mark is wanting, he should cancel the unstamped paper, deliver to the elector another paper duly stamped upon which he may record his vote, and treat the original paper as a spoilt vote.²

659. No person shall interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom he is about to vote or has voted, or induce him to display his ballot paper after he has marked the same so as to make known the name of the candidate for or against whom he has so marked his vote, under liability on summary conviction to imprisonment for a period not exceeding six months with or without hard labour.³

SUBSECTION (6).—*Spoilt Ballot Paper.*

660. If by inadvertence the voter wrongly marks or otherwise deals with his ballot paper in such a manner that it cannot be conveniently used as a ballot paper, he may on delivering the paper so inadvertently dealt with to the presiding officer, and proving to him the fact of the inadvertence, obtain another ballot paper in place of the one so delivered up. The new ballot paper must be taken from the same book of ballot papers as the spoilt one, the number of the register being marked on the counterfoil, as if he were getting a paper for the first time. But before the new paper is marked with the official mark and handed to the elector, the spoilt ballot paper delivered up should be cancelled by writing the words "spoilt" across the face and upon its counterfoil, and a reference should be made on that counterfoil to the number of the new ballot paper issued.⁴

SUBSECTION (7).—*Voters incapacitated by Blindness or other physical cause, Jews, Illiterates.*

661. The presiding officer, on the application of any voter (a) who is incapacitated by blindness or other physical cause from voting in the prescribed manner, or (b) who, being a Jew, and the poll being taken on a Saturday, objects on religious grounds to vote in the prescribed manner, or (c) who makes the declaration in the prescribed manner that he is unable to read, must, in the presence of the agents

¹ Ballot Act, s. 2; Schedule I., Rule 25; Schedule II.

² *Ackers v. Howard* (Thornbury case), 1886, 16 Q.B.D. 739; *Cirencester*, 1893, 4 O'M. & H. 194.

³ Ballot Act, s. 4.

⁴ Ballot Act, Rule 28.

of the candidates, cause the vote of such voter to be marked on a ballot paper in manner directed by such voter, and the ballot paper to be placed in the ballot box; and the name and number on the register of voters of every voter whose vote is marked in pursuance of this rule, and the reason why it is so marked must be entered on a list called "The List of Votes marked by the Presiding Officer." The declaration of inability to read must be made and signed by the voter with his mark at the time of polling before the presiding officer, who must attest it in the prescribed form without exacting any payment therefor. The declaration must be delivered to and retained by the presiding officer. It must not be put up with the ballot paper.¹

SUBSECTION (8).—*Challenge of Voter.*

662. No inquiry is permitted at the time of polling as to the right of any person to vote, except only that regulated by the Parliamentary Election and Corrupt Practices Act, 1880.² The presiding officer or clerk must, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions or either of them:—³

1. Are you the same person whose name appears as A. B. on the Register of Electors now in force for the Parliamentary County of _____ (or for the _____ Division of the Parliamentary County of _____) (or for the Parliamentary Burgh of _____) (or for the _____ Division of the Parliamentary Burgh of _____) (*as the case may be*).
2. Have you already voted, either here or elsewhere, at this election for the Parliamentary County of _____ (or for the _____ Division of the Parliamentary County of _____) (or for the Parliamentary Burgh of _____) (or for the _____ Division of the Parliamentary Burgh of _____) (*as the case may be*).

And if any person shall wilfully make a false answer to either of these questions aforesaid he shall be deemed guilty of a crime and offence within the meaning of the Ballot Act, 1872.

663. These questions can be put to a voter only when he is tendering his vote and not afterwards, and only if required on behalf of a candidate. The presiding officer cannot put the questions voluntarily. The request must be "on behalf of any candidate," which limits the persons who may do so to the candidate himself, if present, or his agent. A registered elector, it is thought, cannot be considered to be within the words "on behalf of a candidate," and in any case would not be in a position to make the request, unless possibly voting at the same time. The questions are to be put verbally. There is no provision or direction for a record

¹ Ballot Act, Rule 26.

² 43 Vict. c. 18, s. 3.

³ *Ibid.*; adapted, 1918 Act, s. 42, and S.R. & O., 1918, No. 1473/S. 63.

being kept. They should be put in the precise words. Any other inquiry is not permissible.¹

664. The object of the first question is to establish the identity of the person and not the identity of the name. The voter may accordingly with safety answer affirmatively, although there is a discrepancy in the entry in the register.² The second is a question of fact. The presiding officer must accept the answer made thereto as conclusive, even if he should have personal knowledge that the voter is deliberately answering falsely. If the voter declines to answer either question when put, or if he answers the first in the negative or the second in the affirmative, his vote cannot be taken.³ If a voter has refused to answer the questions when put, and returns later and desires to do so, it seems to be the duty of the presiding officer to allow him to do so.⁴

665. At a general election the following additional questions have been authorised to be put to a voter:—⁵

1. In the case of a person voting in respect of a residence qualification—

Have you already voted at this general election in respect of a residence qualification?

2. In the case of a person voting in respect of a qualification other than a residence qualification—

Have you already voted at this general election in respect of a qualification other than a residence qualification?

and unless the answer is in the negative the person may not vote. The object of the first question is to prevent a person voting more than once in respect of a residence qualification; and of the second question to prevent a person not possessed of a residence qualification voting a second time in respect of either a business qualification or a university qualification.

SUBSECTION (9).—*Tendered Vote.*

666. If a person representing himself to be a particular elector named in the register applies for a ballot paper after another person has voted as such elector, the applicant, upon duly answering the questions allowed to be asked of voters (if an agent for a candidate has asked the questions to be put), will be entitled to mark a ballot paper in the same manner as any other voter, but the ballot paper to be used in such a case shall be that printed on coloured paper, and must not be put into the ballot box, but must be given to the presiding officer and endorsed by him with the name of the voter and his number in the register of voters, and set aside in a separate packet. The name of the voter and his number on the register should then be entered in the tendered voters list by the returning officer.⁶ If the applicant himself

¹ *Canterbury*, 1835, K. & O. 131.

² *Pryce v. Belcher*, 1847, 4 C.B. 366.

³ 1918 Act, s. 22 (2).

⁴ *Taunton*, 1838, F. & F. 305; *Oldham*, 1869, 1 O'M. & H. 156.

⁵ 1918 Act, s. 22 (2); Second Schedule, Pt. ii.; amended 1928 Act, s. 3; Schedule.

⁶ Ballot Act, Rule 27.

puts the tendered ballot paper into the ballot box instead of returning it to the presiding officer the vote will not be counted by the returning officer and will be held back on a scrutiny.¹

SUBSECTION (10).—*Proxy Voters.*

667. A ballot paper must not be delivered to a person who claims to vote as proxy for the purpose of so voting, unless he produces the proxy paper to the presiding officer.² No proxy paper is valid except a proxy paper in statutory form duly issued by the returning officer.³ Where a person tenders to the presiding officer a proxy paper not issued by the returning officer, the presiding officer should not issue a ballot paper in respect of a proxy paper so tendered.⁴ A person who has voted at an election in his own right is not disqualified from applying at the same election for a ballot paper for the purpose of voting for an elector for whom he has been appointed a proxy and *vice versa*. The provision that a person is not entitled to vote unless his name is on the register of voters does not apply to persons voting as proxy.⁵

668. Questions may be asked by the presiding officer, if required to do so, of any person at a parliamentary election who claims to vote as proxy for an elector.⁶ The questions which may be asked are:—⁷

- (1) Are you the same person whose name appears as A. B. on this proxy paper as entitled to vote as proxy on behalf of C. D.?
- (2) Have you already voted as proxy on behalf of C. D. either here or elsewhere at the election for the _____ (County) (Burgh) of _____ or the _____ Division of the _____ (County) (Burgh) of _____?
- (3) In the case of a person voting as proxy on behalf of a person registered in respect of a residential qualification: Have you already voted at this general election on behalf of C. D. in respect of a residence qualification?
- (4) In the case of a person voting as proxy on behalf of a person registered in respect of a qualification other than a residence qualification: Have you already voted at this general election on behalf of C. D. in respect of a qualification other than a residence qualification?

669. The declaration of inability to read, when made by a proxy, shall be modified so as to make the declaration attest his inability and not that of the elector nominating him.⁸ In the case of an absent voter voting by proxy, a mark will be placed against the name of the elector in the register by the presiding officer as if the elector were voting in person, and the number of the elector on the register, together with the

¹ *Buckrose*, 1886, 4 O'M. & H. 110, at p. 115.

² 1918 Act, Schedule III., s. 11.

³ R.P. 134, Rules 31 and 32.

⁴ *Brander v. Solicitor*, 1923, S.L.T. (Sh. Ct.) 109.

⁵ R.P. 134, Schedule VI.

⁶ 1918 Act, Schedule III., s. 11.

⁷ R.P. 134, Rule 36, modified by 1928 Act, Schedule.

⁸ R.P. 134, Rule 38; Schedule VI.

distinctive letter of the polling district, will be entered on the counterfoil of the ballot paper.¹ The endorsement of a tendered ballot paper must, in the case of a person voting as a proxy, include the name of the person so voting, and also the name and number in the Register of Voters of the person for whom the party was appointed, and the same particulars must be entered on the "Tendered Voters List."²

SUBSECTION (11).—*Keeping Order in Polling Station.*

670. If any person misconducts himself in the polling station, or fails to obey the lawful orders of the presiding officer, such person may immediately, by order of the presiding officer, be removed from the polling station by any constable in or near that station or by any other person authorised in writing by the returning officer to remove him; and the person so removed shall not, unless with permission of the presiding officer, again be allowed to enter the polling station during the day. Any person so removed, if charged with the commission in such polling station of any offence, may be kept in custody until he can be brought before a magistrate. These powers shall not be exercised so as to prevent any elector, who is otherwise entitled to vote at any polling station, from having an opportunity of voting at such station.³

671. When the proceedings are interrupted or obstructed by any riot or open violence, the Sheriff or the presiding officer at the place may adjourn the taking of the poll at that particular place to the following day, or some other convenient time, and, if necessary, may repeat such adjournment till the interruption or obstruction have ceased.⁴ Whenever the poll has been adjourned by any deputy or presiding officer he is to give notice to the returning officer.⁴ Adjournment is the proper course to pursue. The poll once closed cannot be reopened.⁵

SUBSECTION (12).—*Close of Poll.*

672. The poll must be closed at 8 p.m. (Greenwich mean time)⁶ unless the time has been extended under the provisions of the Extension of Polling Hours Act, 1913⁷ to 9 p.m. Exactly at eight o'clock, or nine o'clock as the case may be, the doors of the polling station are to be closed,⁸ and no person shall thereafter be admitted into the station for the purpose of voting.⁹ Further, of the voters who are within the polling station when it is closed, only those voters who have actually had ballot papers delivered to them before 8 p.m. or 9 p.m., as the case may be, are entitled to mark such ballot papers and deposit them in the

¹ R.P. 134, Rule 35; Schedule VI.

² *Ibid.*, Rule 35; Schedule VI.

³ Ballot Act, s. 9.

⁴ 6 William IV. c. 78, s. 5; Ballot Act, Rule 10.

⁵ *Roxburgh*, 1838, F. & F. 503; *Harwich*, 1857, 1 P.R. & D. 314; *Islington*, 1901, 5 O'M. & H. 125.

⁶ 48 Vict. c. 10, s. 1.

⁷ 3 & 4 Geo. V. c. 6, s. 1 (1).

⁸ *Islington*, 1901, 5 O'M. & H. 129.

⁹ *Latham v. Glasgow Corporation*, 1921 S.C. 694 (*Whiteinch* case), at p. 713.

ballot box before the ballot box is closed and sealed. It is illegal for the presiding officer to act otherwise.¹

SUBSECTION (13).—*Ballot Paper Account.*

673. Immediately on the close of the poll the presiding officer makes up a statement entitled the Ballot Paper Account, showing the number of ballot papers entrusted to him and accounting for them under the heads of (a) "ballot papers in the ballot box"; (b) "unused"; (c) "spoilt"; and (d) an account in the case of "Tendered Ballot Papers."² When the account is made up the total number of ballot papers under the several heads should equal the original number issued to the presiding officer. The utmost care should be taken to have the ballot paper account correct, as an inaccuracy therein may interfere with the proper counting of the votes.

SUBSECTION (14).—*Sealing of Ballot Boxes, etc.*

674. As soon as practicable after the close of the poll, which can be only after the ballot paper account is made up, the presiding officer must, in the presence of such of the agents of the candidates as may be present, make up into separate packets, sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals:—

- (1) Every ballot box in use, unopened, but with the key attached, and so closed and sealed up as to prevent the introduction of additional ballot papers.
- (2) The unused and spoilt ballot papers placed together.—At the close of the poll the stitching of the ballot book in use must be cut, and all the unused ballot papers with their counterfoils must be removed. These unused ballot papers and counterfoils, with any books of ballot papers which have not been begun to be used when the poll is closed, must then be sealed up with the spoilt ballot papers, leaving merely the counterfoils of the used, and the counterfoils of the spoilt ballot papers to be sealed up together, as directed in (4) below.
- (3) The tendered (coloured) ballot papers, and
- (4) The tendered votes list, and the list of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer under the heads "Physical Incapacity," "Jews," and "Unable to read," and the declarations of inability to read.³

The presiding officer must thereafter hand over to the returning officer the ballot box, sealed packets, ballot paper account, and stamping instruments, and is responsible for their safe and prompt delivery.

¹ *Islington*, 1901, 5 O'M. & H. 129.

² Ballot Act, Rule 30.

³ *Ibid.*, Rule 29.

SECTION 14.—COUNTING OF THE VOTES.

SUBSECTION (1).—*Arrangements for Count.*

675. The returning officer must make arrangements for counting the votes in the presence of the agents of the candidates as soon as practicable after the close of the poll.¹ The candidates may respectively appoint agents to attend the counting of the votes.² No definite number is stated in the Act, and the number will be fixed in the discretion of the returning officer. The name and address of every agent appointed for the counting must be transmitted to the returning officer at least one clear day before the opening of the poll.³ The returning officer must give to the agents so appointed notice in writing of the time and place at which he will begin to count the votes. The notices will be posted to or delivered at the addresses of the agents as intimated.⁴ As the counting cannot begin until all the ballot boxes have been received, it is prudent in the notice to name a definite hour or later immediately after the arrival of the last ballot box. The returning officer may refuse to admit to the place where the votes are counted any agent whose name and address has not been transmitted to him, notwithstanding that his appointment may be otherwise valid.³

676. No person except the returning officer and his clerks and assistants and the candidates and the agents of the candidates may be present, except with the sanction of the returning officer.⁵ All the persons present except the candidate must, prior to the opening of the poll, have taken the oath to maintain the secrecy of the voting, and not to attempt to ascertain the number on the back of any ballot paper or to communicate any information obtained at the counting as to the candidate for whom any vote is given, under liability on conviction to six months' imprisonment.⁶ Candidates, who are entitled to be present,⁷ do not require to take the oath. If any person authorised to attend at the counting dies or becomes incapable of acting the candidate may appoint another agent in his place, and must forthwith give the returning officer notice in writing of the name and address of the agent so appointed.⁸ This rule does not exempt the new appointee from the necessity of having taken the oath before the opening of the poll. This difficulty is obviated by a sufficient number of reserve agents timeously taking the oath. The non-attendance of any agents at the counting does not invalidate the proceedings.⁹

SUBSECTION (2).—*The First Count.*

677. Before the returning officer proceeds to count the votes he must, in the presence of the agents of the candidates, open each ballot box,

¹ Ballot Act, s. 2.² *Ibid.*, Rule 31.³ *Ibid.*, Rule 52.⁴ *Ibid.*, Rule 32.⁵ *Ibid.*, Rule 33.⁶ *Ibid.*, s. 4.⁷ *Clementson v. Mason*, 1875, L.R. 10 C.P. 209.⁸ Ballot Act, Rule 53.⁹ *Ibid.*, Rule 55.

and taking out the papers therein shall count and record the number thereof, and then mix together the whole of the ballot papers contained in the ballot boxes. The returning officer, while counting and recording the number of ballot papers, and counting the votes, shall keep the ballot papers with their faces upwards and take all precautions for preventing any person from seeing the numbers printed on the backs of such papers.¹ So far as practicable the returning officer is to proceed continuously with counting the votes, allowing only time for refreshment, and excluding between 7 p.m. and 9 a.m., except by agreement with the agents. During the excluded time the ballot papers and other documents must be sealed up by the returning officer and by such of the agents as desire to do so, and otherwise proper precautions must be taken for their security.²

678. The first count is really a preliminary one for the sole purpose of ascertaining the number of actual papers in each ballot box, thereby checking the corresponding number returned by the presiding officer in his Ballot Paper Account. This operation is of great importance and requires to be performed with the utmost care and accuracy as it is the foundation of all the further proceedings. The total number of voting papers actually found to be in the several ballot boxes is the number of voting papers which the returning officer must account for after counting the votes for the different candidates. As the voting papers when emptied out of each ballot box are in confusion they require to be separated and arranged into bundles, usually of fifty each, and counted with great care. If a discrepancy is found between the result as ascertained by the enumerator and the corresponding figure in the presiding officer's Ballot Paper Account, the ballot box must be recounted. If ultimately a discrepancy still exists, the returning officer will record the enumerators' result and make a note of the difference. During this count, both to preserve the secrecy of the ballot and to secure accuracy, the returning officer usually does not allow either the candidates or their agents to approach the enumerators.

SUBSECTION (3).—*The Second Count.*

(i) *Method of Counting.*

679. This count is for the purpose of ascertaining the votes given for each candidate. The following are the arrangements usually observed. Before this count the enumerators will be arranged in pairs at separate tables, with a receptacle in front of them divided into pigeon holes of which one will be labelled with the name of each candidate, and one labelled "Doubtful." The enumerators will receive relays of bundles of voting papers from the returning officer. The enumerators will examine each voting paper in order to see whether it is a good vote or not. If it has the official mark on the back, has

¹ Ballot Act, Rule 34.

² *Ibid.*, Rule 35.

nothing on it but one simple cross, and that cross is placed unmistakably for one of the candidates, and to the right of the candidate's name, they will treat it as a good vote, and place it for the candidate preferred in the pigeon hole labelled with his name. All other voting papers they will treat as doubtful and place in the pigeon hole so labelled. The good votes for each candidate, made up in bundles of 50 or 100 as may have been arranged, will be collected from the enumerators and taken to separate tables, one allotted to each candidate, and checked, and made up into bundles of 500 or such other arranged number.

(ii) *Doubtful Papers.*

680. The voting papers which the enumerators have put aside as doubtful are taken to the returning officer to dispose of. The returning officer, in presence of the candidates or their agents, will adjudicate on these voting papers. He must endorse "rejected" on any ballot paper which he may reject as invalid, and must add to the endorsement "rejection objected to" if an objection be in fact made by any agent to his decision.¹

(iii) *Votes not to be Counted.*

681. Any ballot paper is void and must not be counted—

- (1) which has not on its back the official mark;
- (2) on which votes are given to more candidates than the voter is entitled to vote for;
- (3) on which anything except the number on the back is written or marked by which the voter can be identified;²
- (4) which is unmarked;
- (5) which is void for uncertainty.³

Before dealing with these grounds of rejection, the difference in the interpretation and application of the Ballot Act which exists between the Courts in Scotland and in England may be stated.

682. Section 2 of the Ballot Act enacts: "The voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box," and s. 28 enacts: "The schedules to this Act and the notes thereto and directions therein shall be construed and have effect as part of this Act." Rule 25 (First Schedule) states: "The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station and there mark his paper, and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box." In Schedule 2 are given "Directions for the Guidance of the Voter," which *inter alia* are: "The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right-hand side, opposite the name of each candidate for whom he votes, thus X," and "if the voter votes for more than [one] candidate,

¹ Ballot Act, Rule 36.

² *Ibid.*, s. 2.

³ *Ibid.*, Rule 36.

or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void and will not be counted." The form of ballot paper given in the Schedule contains a note repeating the first of these directions.

683. In *Haswell v. Stewart* (the *Wigtown* case)¹ the Court of Session, holding that the directions in the Schedules as to the method and manner of voting and the prohibition against making any mark other than a cross on the ballot paper were imperative, decided (1) that, making due allowance for any imperfections in execution, it is essential to a valid vote that the ballot paper be marked with a cross, and not a mere line; (2) that a ballot paper with the cross decidedly to the left of the candidate's name must be rejected; (3) that any mark on the back of the ballot paper other than the printed number renders the vote null; (4) that any substantive and separate mark on the face of the ballot paper *per se* vitiates the vote, whether it is *ex facie* of such a description that the voter can be identified thereby or not; and (5) that it is not essential that the cross should be made with the pencil provided in the compartment. Lord Benholme dissented from the findings (2) and (4).

684. In *Woodward v. Sarsons* (the *Birmingham* case)² the Court of Common Pleas held that the only absolute enactment is in s. 2 that the voter shall mark his vote secretly, and that the rules in the First Schedule and the form in the Second Schedule are merely directory. The Court stated their view of the essentials to the validity of a ballot paper thus: The paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void. They accordingly held as valid ballot papers marked with (a) Two or three crosses instead of one; (b) a straight vertical line instead of a cross; (c) a straight stroke in addition to a cross; (d) a letter P in addition to a cross; (e) an oblique line instead of a cross; (f) a star instead of a cross; (g) a pencil line drawn through the name of one candidate and a cross opposite that of another; and (h) a cross placed on the left instead of the right-hand side of the candidate's name. They added, "we are aware that in so applying the principles which we have deduced from the statutes, we are acting apparently in opposition to some of the decisions in the *Wigtown* case; but there may have been evidence in that case which does not exist in the present case, and which made many of the marks there marks of identification,

¹ 1874, 1 R. 925; 2 O'M. & H. 216.

² 1875, L.R. 10 C.P. 733 (the ballot papers were lithographed).

which the mere presence of such marks here does not do. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benholme given in that case."

685. A Select Committee of the House of Commons reported (6th April 1876) that no ballot paper should be rejected unless it appears clearly to the returning officer that the obligatory portion of the Act has not been complied with, and that the marking of the ballot paper in a manner not in accordance with the "directions" should not cause its rejection, unless it appears to the returning officer that such departure from the directions has been for the purpose of identification, or would necessarily afford an opportunity for such identification being effected, or unless the returning officer is unable to determine for whom the voter intended to vote. They further recommended that a bill should be framed declaring the law to be in accordance with the English judgment in *Woodward v. Sarsons*. Although the Ballot Act was renewed annually by Parliament from 1880 until 1918, when it was made permanent,¹ the recommendation of the Select Committee has never received legislative effect.

686. In *Robertson v. Adamson* (the *Musselburgh* case)² a Court of seven judges, with the decision in the *Birmingham* case and the Select Committee's report before them, held that a single stroke marked by a voter opposite the name of a candidate on a ballot paper was not equivalent to a cross as required by the Act, and was a mark by which the voter might be identified. The Lord Justice-Clerk (Moncreiff), who gave the leading judgment, after expressing his approval of and concurrence with the decision in the *Wigtown* case, said: "It is argued that these provisions are directory only and not imperative; and that therefore substantial and not implicit compliance with them is all that is required. I do not differ from this as a general proposition. . . . But the directions given to the elector and to the returning officer as to what he is to do, or what he is not to do, are of a different class, and some of them at least in order to be substantially must be implicitly followed, especially in those matters which are prohibited . . . which must be as specifically complied with as if they had been specially provided in the body of the statute. If the only object of the direction given to the voter to place a cross opposite the name of the candidate for whom he votes (which is expressed in imperative terms) had been to ascertain for whom he intended to vote, the provision would have been construed favourably for the voter, and any such mark which sufficiently indicated his intention might have been sufficient. . . . But we must take this direction along with the prohibition which follows, for if a mark which is not that prescribed in the statute be a mark by which the voter may be afterwards identified, it follows that the object of providing a special mark, and enjoining its use, was not only to enable the voter to indicate for

¹ 1918 Act, s. 35.

² 1876, 3 R. 978.

whom he voted, but by prescribing uniformity in such marks to prevent the secrecy of the vote from being violated. In regard to this most vital prohibition it seems clear first, that it is not necessary, in order to bring a mark placed on the ballot paper within the scope of the prohibition, that it should disclose the identity of the voter on the face of it. Such a prohibition would have been futile, for nothing but a signature and designation would have that effect. Even a signature by itself would not do so, as there might be other electors of the same name, and identification by handwriting requires extrinsic evidence. . . . In the second place, the only question which seems contemplated by the direction is, whether on the inspection of the ballot paper it bears a mark by which the voter may be afterwards identified. It is here that, with the greatest respect, I chiefly differ from the learned judges in the case of *Woodward*. They say that the prohibition means that the voter is not to vote 'so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted'—that is to say, that if he cannot be identified by seeing the paper itself, and if no other facts are available, it is immaterial what marks appear on the paper. I find no such qualification in the words of this statute, nor do I think it harmonises with the reason of the prohibition. The statute does not appear to me to contemplate that the returning officer shall refer to any facts excepting those which he finds in the paper itself. He is to look at it, and if he finds (1) that it is without the official mark, or (2) that the voter has voted for more candidates than he should, or (3) that it has a mark on it by which the voter can or may be identified, or (4) that it is uncertain, he is then and there to reject the vote. With the interest or object of these things, save what the paper discloses, he has no concern. In regard to marks, he is to decide merely on their character, and if he finds that they are such as can or may lead to the voter being afterwards identified, he is to reject the vote, and if he does not so find on inspection of the paper he is to admit the vote. Whether the mark would in point of fact enable him to identify the voter is of no consequence, and he can have no means of knowing. . . . To hold that before this prohibition is to receive effect there must be proof, either absolute or *prima facie*, of the intent with which the paper was so marked would be to nullify altogether a provision which seems vital to the statute. . . .”

687. The opinion of Lord Moncreiff was approved by the other judges, who expressed opinions to a like effect and concurred with the decision in the *Wigtown* case. Lord Deas, who alone dissented, agreed that the instructions in the Schedule, though directory, must be substantially complied with. On the question of what was substantial compliance, he agreed with the reasoning of the English judges in the case of *Woodward*. The Court further, without the consulted judges, held (1) that crosses on a ballot paper to the right-hand side of the candidates' names, but not within the spaces marked off for them, were in compliance with the Act; (2) that crosses to the left-hand side of the

candidates' names were not in compliance with the provisions of the Act; and (3) that certain marks in the proper space, which, though not crosses, involved the use of more than a single stroke, were sufficiently in compliance with the Act, and the vote was valid.

688. Since the *Musselburgh* case the English Courts have frequently affirmed the judgment in the *Birmingham* case and disapproved of the decision in the *Wigtown* case.¹ In the *Cirencester*, *Exeter*, and *Buckrose* cases, which all dealt with ballot papers containing marks which might lead to the identification of the voter, the decision in the *Birmingham* case was approved and the decision in the *Wigtown* case disapproved. But in none of these cases does the decision in the *Musselburgh* case appear to have been reviewed by the English judges, nor is it discussed or commented on by any of the learned English textbook writers. In any view, the law laid down in the *Wigtown* and *Musselburgh* cases, until modified by later decisions, is binding upon and is the sole guide to returning officers in Scotland in construing and applying the Act. The grounds of rejection of a ballot paper will now be considered in the light of this decision.

(iv) *Want of Official Mark.*

689. Any ballot paper which has not on its back the official mark is void and not to be counted.² But not if the mark is merely wanting on the face.³ And ballot papers marked only on the face, but through which the ink had penetrated so as to make a mark visible on the back have been held good.⁴ A voting paper was objected to as invalid for want of the official mark, where a presiding officer, in issuing a ballot paper, had accidentally torn off two papers which had become slightly adhesive, and had marked the back of the outermost and the face of the innermost on which the vote was subsequently given. The presiding officer did not discover the mistake until after the ballot paper had been inserted in the ballot box. At the counting the papers were found separate. The Court found it unnecessary to dispose of the objection, and it was undecided.⁵

(v) *Voting for more Candidates than entitled to.*

690. Any ballot paper on which votes are given to more candidates than the voter is entitled to vote for is void and not to be counted.⁶ A person who was on the roll of electors in two burghs in a district of burghs

¹ *Phillips v. Goff*, 1886, 17 Q.B.D. 805, per Cockburn L.C.J. at p. 811; *Buckrose*, 1886, 4 O'M. & H. 110; *Cirencester*, 1893, 4 O'M. & H. 194; *Exeter*, 1911, 6 O'M. & H. 229.

² Ballot Act, s. 2.

³ *Wigtown*, 1874, 1 R. 925; 2 O'M. & H. 216.

⁴ *Ackers v. Howard* (*Thornbury* case), 1886, 16 Q.B.D. 739, at p. 746; *Cirencester*, *supra*.

⁵ *Anstruther v. Williamson* (*St. Andrews* case), 1886, 13 R. 577.

⁶ Ballot Act, s. 2; *Woodward v. Sarsons* (*Birmingham* case), 1875, L.R. 10 C.P. at p. 748; *Phillips v. Goff*, *supra*, at p. 816; *Exeter*, *supra*.

constituency, under error as to his right to vote, voted in both. The vote he had first given was admitted, and the second rejected.¹

(vi) *Writing or Mark by which Voter could be Identified.*

691. Any ballot paper on which anything except the number on the back is written or marked by which the voter can be identified is void and not to be counted.² Any of the following will invalidate the vote:—

- (1) Writing of any kind on any part of the ballot paper. It is immaterial that the writing was improperly put on by the presiding officer; the vote is bad.³
- (2) The use of any form of mark materially different from the cross specified in the directions. The mark must be a cross, and not a straight or curved line or a circle or an oval or any other geometrical or anomalous figure.⁴ But the fact that the cross is not well made or that the lines are rough, streaky, or uncouth or imperfectly made and irregular arising from want of skill, unsteadiness of hand or accidental disturbance, or that the cross has feet or claws to support it, like the capital letter X, will not disqualify; nor will a mark consisting of two vertical lines.⁵
- (3) The placing of the mark, whether in the prescribed form or not, decidedly on the left-hand side of the candidate's name or otherwise than to the right of his name.⁶
- (4) A substantive and separate addition on any part of the ballot paper to the voter's mark of his vote. Any writing, a deviation in the position of the cross, a multiplicity of crosses, or an addition of lines or marks of any description or any deletions on the ballot paper will be fatal, as all these deviations are devices by which the voter can or may be identified. It is not a question of whether the returning officer can do so or not.⁷

(vii) *Ballot Paper unmarked.*

692. A ballot paper which is unmarked must not be counted.⁸ It is not essential that the paper should be marked with the pencil provided. Any mark, however faint, made with pen and ink, a coloured pencil, coloured ink, a burnt piece of wood, or an indentation probably by a finger nail is sufficient to prevent the ballot paper being rejected.⁸

¹ *St. Andrews*, 1886, 13 R. 577.

² Ballot Act, s. 2.

³ *Deans v. Mags. of Haddington*, 1882, 9 R. 1077.

⁴ *Wigtown*, 1874, 1 R. 925; 2 O'M. & H. 216.

⁵ *Musselburgh*, 1876, 3 R. 978.

⁶ *Wigtown*, *supra*; *Musselburgh*, *supra*.

⁷ Ballot Act, Rule 36.

⁸ *Wigtown*, *supra*; *Berwick-on-Tweed*, 1880, 3 O'M. & H. 178; *Oldham*, 1869, 1 O'M. & H. 157; *Cirencester*, 1893, 4 O'M. & H. 194.

(viii) *Ballot Paper void from Uncertainty.*¹

693. In Scotland, where there are only two candidates and a mark is placed outside the candidate's compartment and above or below the transverse line dividing the paper, but to the right of the vertical line, the vote is admitted. It is also not invalidated by being outside the candidate's compartment if to the right thereof.² In England, where the mark is placed at the top or bottom of the ballot paper outside the candidate's compartment, the vote is bad.³ When the mark was placed outside the candidate's compartment but opposite his name, the vote was held bad in the *Cirencester* case and good in the *Pontardawe* case. Where a cross is on the dividing line between two candidates the vote is void from uncertainty, but where the cross extended into the spaces opposite the names of two candidates, the vote was counted for the candidate in the space opposite whose name the intersection of the cross appeared.⁴

694. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return.⁵

SUBSECTION (4).—*Result of Second Count.*

695. At the conclusion of the second count the total votes ascertained for each candidate together with the votes rejected by the returning officer should equal the number of votes recorded by him at the first count as having been contained in the ballot boxes. If not, and there is a discrepancy, a recount may be rendered necessary.

SUBSECTION (5).—*Equality of Votes—Casting Vote.*

696. Where the votes are found to be equal between two candidates, the returning officer, if a registered elector for the constituency, may give an additional vote to one of the candidates. He is not in any other case entitled to vote at an election for which he is returning officer.⁵

SECTION 15.—DECLARATION OF ELECTION.

697. On the conclusion of the counting the returning officer must forthwith declare to be elected the candidate to whom the majority of votes has been given. If there is an equality of votes between the candidates, and the returning officer has not voted or is not qualified to vote, he must so declare and make a double return.⁵ This is rendered necessary through no provision being made for the happening of either

¹ Ballot Act, Rule 36.² *Musselburgh*, 1876, 3 R. 978.³ *Berwick-upon-Tweed*, 1880, 3 O'M. & H. 178; *Stepney*, 1886, 4 O'M. & H. 34; *Buckrose*, 1886, 4 O'M. & H. 110; *West Bromwich*, 1911, 6 O'M. & H. 257; *N. E. Derbyshire*, 1923, 39 T.L.R. 423.⁴ *Berwick-upon-Tweed*, *supra*; *Cirencester*, 1893, 4 O'M. & H. 194; *West Bromwich*, *supra*.⁵ Ballot Act, s. 2.

contingency. The declaration is usually made at once *viva voce* outside the place in which the counting has taken place, and public notice must as soon as possible be given of the name of the candidate elected, and of the total number of votes given for each candidate, whether elected or not.¹

SECTION 16.—RETURN.

698. The returning officer is, after the result of the election has been ascertained, forthwith to return the name of the successful candidate to the Clerk of the Crown in Chancery.² This is done by an endorsement of a certificate³ in the prescribed form⁴ on the writ (which is usually printed thereon). The endorsement should be in terms identical with the name, designation, and other particulars of the successful candidate in his nomination paper. A double return is made by endorsing two certificates on the writ.

699. The endorsed writ must be delivered to the postmaster of the principal post office of the place of election, and a receipt taken from him for the same; and such postmaster or his deputy must then forward the same by the first post, free of charge, under cover to the Clerk of the Crown, with the words "Election Writ and Return" endorsed thereon.⁵

SECTION 17.—CUSTODY OF BALLOT PAPERS, ETC.

700. Upon the completion of the counting, the returning officer must seal up in separate packets (*a*) the counted and (*b*) the rejected ballot papers. He must then proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers which he has already recorded, the unused and spoilt ballot papers in his possession, and the tendered voters list made up by each presiding officer, and must reseal each packet after examination. He must report to the sheriff-clerk of the county in which the return is made the result of such verification, and must on request allow any agents of the candidates before such report is sent to copy it. He is not to open the packet of tendered ballot papers, or the marked copy of the register of voters, or the counterfoils of the ballot papers.⁶ The returning officer must also report to the said sheriff-clerk the numbers of ballot papers rejected and not counted by him under the several heads of—(1) Want of official mark; (2) Voting for more candidates than entitled to; (3) Writing or mark by which voter could be identified; (4) Unmarked or void for uncertainty, and must on request allow any agents of the candidates before such report is sent to copy it.⁷

701. Lastly, the returning officer must forward to the sheriff-clerk the packets of ballot papers with the reports above mentioned, the

¹ Ballot Act, Rule 45.

⁴ *Ibid.*, Schedule II.

⁶ *Ibid.*, Rule 37.

² *Ibid.*, s. 2.

⁵ *Ibid.*, Rule 44.

⁷ *Ibid.*, Rule 36.

³ *Ibid.*, s. 44.

ballot paper accounts, tendered votes lists, lists of votes marked by the presiding officers, statements relating thereto, declarations of inability to read, packets of counterfoils, and marked copies of registers;¹ and also the marked copy of the absent voters list, the counterfoils of the ballot papers sent to absent voters, the declarations of identity accompanying ballot papers sent by absent voters, rejected declarations of identity and rejected ballot papers covering envelopes received after the close of the poll and envelopes addressed to absent voters returned as undelivered.² The sheriff-clerk shall retain for a year all the documents forwarded to him, and then, unless otherwise directed by an order of the House of Commons or of one of His Majesty's superior Courts, shall cause them to be destroyed.³

702. No person is to be allowed to inspect any rejected ballot papers in the custody of the sheriff-clerk except under the Order of the House of Commons or of one of His Majesty's superior Courts granted by such Court on evidence on oath that the inspection is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers or an election petition, and subject to such conditions as to persons, time, place, and mode as the House of Commons or the Court may think expedient.⁴ No person is to be allowed to (1) open the sealed packet of counterfoils, or (2) inspect any counted ballot papers in the custody of the sheriff-clerk except by order of the House of Commons, or of any tribunal having cognisance of petitions complaining of undue returns or undue elections, under such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient, care being taken in making and carrying into effect any such order that the mode in which any particular elector has voted be not discovered until it is proved that he did vote and his vote has been declared invalid.⁵

703. All documents, other than ballot papers and counterfoils in the custody of the sheriff-clerk are to be open to public inspection at such times and under such regulations as may be prescribed by him with the consent of the Speaker of the House of Commons. The sheriff-clerk shall supply copies or extracts of the said documents to any applicant on payment of such fees and on such regulations as may be sanctioned by the Treasury.⁶

SECTION 18.—CANDIDATE'S ELECTION AGENT.

SUBSECTION (1).—*Appointment of Agent.*

704. An election agent—and only one—must be appointed by every candidate on or before the day of nomination, and the name and address of the person so appointed must be declared in writing by the candidate or someone on his behalf to the returning officer on or before the day of

¹ Ballot Act, Rule 38.

² R.P. 134, s. 29 (4).

³ Ballot Act, Rule 39.

⁴ *Ibid.*, Rule 40.

⁵ *Ibid.*, Rule 41.

⁶ *Ibid.*, Rule 42.

nomination, and by him forthwith published. The appointment may be revoked before, during, or after the election, and on such revocation, or on his death, a new election agent must be appointed and intimated to and published by the returning officer as in the original appointment.¹ Any person may be appointed an election agent, except a returning officer or his partner or clerk,² or any person who has within seven years before been found guilty of any corrupt practice,³ or a Sheriff or salaried Sheriff-Substitute in any election occurring within his jurisdiction.⁴ A candidate may name himself as election agent, and thereupon is, so far as circumstances admit, to be subject to the provisions of the Act both as a candidate and as an election agent, and any reference in the Act to an election agent is to be construed to refer to the candidate acting in his capacity of election agent.⁵

705. While the appointment of an election agent on the nomination day fulfils the statutory requirement, it should be made at the earliest possible moment. Delay may cause serious prejudice to a candidate, whose candidature may none the less have begun at a date long prior to a vacancy or dissolution notwithstanding that he has designated himself a "future" or "prospective" candidate. If the object of the person, as proved by his acting, is not merely to introduce himself as a future candidate for the constituency but, irrespective of the future, to promote his candidature in such a way as to put himself in such a position that he will be ready for the election, what he does may be considered as part of the conduct and management of the election.⁶

706. The selection and appointment of an election agent is a matter of great responsibility, affecting alike the candidate and the appointee. No person should be appointed who is not acquainted with the conduct of elections and the provisions of the Ballot Act and the Corrupt and Illegal Practices Prevention Act, 1883. In a recent case the law was resumed by the Lord President (Clyde) thus:⁷ "The cesser of the excuse for employing unskilled persons—which followed on the disappearance of the exceptional conditions [the War period] that made their employment justifiable—applies also to unskilled persons offering themselves for employment in that capacity. As Lord Mackenzie put it in *Munro and M'Mullen*:⁸ 'It must be understood that a man who is not a lawyer, if he engages to act as an election agent, must recognise that his first duty is to make himself acquainted with his obligations.' This case, I think, ought to be a sufficient warning to men who take up the duties of election agent that their first business is to acquaint themselves with what their duties are, especially with reference to the statute. It follows that the time for giving indulgence to unskilled

¹ 46 & 47 Vict. c. 51, s. 24.

² Ballot Act, s. 11.

³ 31 & 32 Vict. c. 125, s. 44.

⁴ 7 Edw. VII. c. 57, s. 21; amended by 2 & 3 Geo. V. s. 28, Schedule I.

⁵ 46 & 47 Vict. c. 51, s. 24 (2).

⁶ *East Dorset*, 1910, 6 O'M. & H. 30, per Pickford J.

⁷ *Pole and Scanlon*, 1921 S.C. 98, at pp. 102, 103.

⁸ *Munro and M'Mullen v. Mackintosh*, 1920 S.C. 218, at p. 221.

persons such as the election agent in the present case must be regarded as past.” And in a later case,¹ where the candidate had appointed as election agent a person who had had no experience in the conduct and management of elections, and was in a state of abysmal ignorance as to election law, it was observed that “people who employ crossing-sweepers to mend watches cannot complain if the result is unsuccessful.”

SUBSECTION (2).—*Appointment of Sub-Agents.*

707. In counties and divisions of counties an election agent may appoint one sub-agent, but no more, for each polling district.² Any-one may be appointed who is not disqualified from being an election agent. No time within which the appointment is to be made is specified, but one day before the polling the election agent must declare in writing the name and address of every sub-agent to the returning officer, who must forthwith publish the same.³ While notice one day before the polling is a strict compliance with the statute, obviously in practice it will and ought to be given before. The object of the notice is that the public or the electors may know, at all events by that date, that the persons named were in fact sub-agents, so that they may trace back any responsibility for any act done by these persons.⁴ The appointment of a sub-agent may be revoked by the election agent for the time being of the candidate, but is not revoked by the election agent who appointed him vacating his appointment. In the event of revocation or the death of a sub-agent, another sub-agent may be appointed, whose name and address must be intimated to and published by the returning officer.⁵

SUBSECTION (3).—*Offices of Agent and Sub-Agents.*

708. An election agent for a county or borough and a sub-agent for a polling district in a county must have an office or place to which all claims, notices, writs, summonses, and documents may be sent, and this must be intimated to the returning officer at the same time as their respective appointments are declared.⁶

SUBSECTION (4).—*Contracts by Agent and Sub-Agents.*

709. All appointments of polling agents, clerks, and messengers, and all hirings of committee-rooms must be made by the election agent or his sub-agent,⁷ and no contract involving expenses on account of or in respect of the conduct or management of an election is enforceable against a candidate, unless made by himself or his election agent or

¹ *Oxford*, 1923, 7 O'M. & H. 49, per Sankey J. at pp. 65, 66.

² 46 & 47 Vict. c. 51, s. 25 (1); First Schedule.

³ *Ibid.*, s. 25 (3).

⁴ *Berwick-upon-Tweed*, 1923, 7 O'M. & H. 1.

⁶ *Ibid.*, s. 26 (1).

⁵ 46 & 47 Vict. c. 51, s. 25 (4).

⁷ *Ibid.*, s. 27 (1).

sub-agent,¹ nor can any payment, advance, or deposit be made in respect of any expenses incurred on account of or in respect of the conduct or management of the election otherwise than by or through the election agent or a sub-agent;² nor can any person incur any expense on account of holding meetings or issuing advertisements, circulars, or publications for the purpose of promoting or procuring the election of the candidate, unless he is authorised in writing to do so by such election agent.³

SECTION 19.—ELECTION EXPENSES.

SUBSECTION (1).—*Duty of Election Agent.*

710. The primary duty of the election agent is to keep the expenditure of the candidate within the statutory limit, and to be able to account for every penny spent. His duty and obligation is defined in s. 8 of the Corrupt and Illegal Practices Act, 1883,⁴ which enacts that, subject to such exception as may be allowed in pursuance of the Act, no sum shall be paid and no expense shall be incurred by a candidate at an election or his election agent, whether before, during, or after an election, on account of or in respect of the conduct or management of such election in excess of any maximum amount in that behalf specified in the First Schedule to the Act; and that any candidate or election agent who knowingly acts in contravention of the section shall be guilty of an illegal practice. And also in s. 29 (1) which enacts that every payment made by an election agent, whether by himself or by a sub-agent, in respect of any expenses incurred on account of or in respect of the conduct or management of an election shall, except where less than forty shillings, be vouched by a bill stating the particulars, and by a receipt.

711. The Court has frequently laid down rules for the guidance of an election agent in the performance of his duties. In *Pontefract*⁵ Mr Justice Cave said, the election agent “should enter in a book who are the responsible people, who are the agents, who are the clerks, who are the canvassers, and so on; and if this is done, at any rate he cannot be complained of for not having done his duty and shewn a desire to act honestly.” And in *Stepney*,⁶ the same judge said: “He ought to keep a cash-book in which everything should be set down in chronological order, so that it can be told, by looking at the cash-book, when each sum was spent, how it was spent, and to whom it was given. He would be well advised also if he had an order-book with counterfoils, which should be numbered consecutively, and wrote down every order upon the form and upon the counterfoil, so that by an inspection of the book one could at once see that all the counterfoils were there and that everything that had been ordered was put down in its place and on the counterfoil that belonged to it. And, lastly, he would be wise

¹ 46 & 47 Vict. c. 51, s. 27 (2).

² *Ibid.*, s. 28.

³ 8 & 9 Geo. V. c. 64, s. 34.; *Rex v. Hailwood*, [1928] 2 K.B. 279; 28 Cox C.C. 489.

⁴ 46 & 47 Vict. c. 51.

⁵ 1892, Day's El. Cas. 35.

⁶ *Ibid.*, 75.

to have a receipt-book made up in a similar form, and to take a receipt from the persons to whom he pays any money, upon one of these forms, using them also again consecutively, and in chronological order. When a man has got these documents he can come with confidence before an electional tribunal and say, 'These books represent everything I have ordered, everything I have spent, everything I have paid.'" In *Berwick-upon-Tweed*¹ Mr Justice Avory, after criticising the election agent's failure to keep a cash-book or receipt-book or counterfoil order-book, said: "In inquiring into the amount of the expenses which in fact were incurred at this election, we are entirely dependent upon the vouchers or receipts which have been produced. There is no record by which they can be checked; no record to say what other accounts may have been paid, or what others might still be outstanding; and it is in my view impossible to say that in such a case it is open to the election agent to say that he has not infringed this section [8], because you cannot point to any particular date when he made any particular payment, or incurred any particular expense, and shewed that at that time he knew he was exceeding the maximum." . . .

SUBSECTION (2).—*Maximum Amount Allowed.*

712. The maximum amount which a candidate is entitled to spend on election expenses is regulated by s. 33 of the Representation of the People Act, 1918, by referring to the First Schedule to the Corrupt and Illegal Practices Act, 1883, and incorporating in that schedule certain new provisions in substitution for existing provisions therein. A further amendment has been made by the 1928 Act,² substituting in Part IV. sixpence for sevenpence as the rate allowed in ascertaining the maximum in a county election. The following is the amended schedule:—

(i) *Persons Legally Employed for Payment.*³

713. (1) One election agent and no more.

(2) In counties, one deputy election agent (referred to as a sub-agent) to act within each polling district, and no more.

(3) One polling agent in each polling station and no more.

(4) In a borough, one clerk and one messenger, or if the number of electors in the borough exceeds 500, a number of clerks and messengers not exceeding in number one clerk and one messenger for every complete 500 electors in the borough, and if there is a number of electors over and above any complete 500, or complete 500's of electors, then one clerk and one messenger may be employed for such number, although not amounting to a complete 500.

(5) In a county, for the central committee-room, one clerk and one

¹ 1923, 7 O'M. & H. 1, at p. 20; see para. 757, *infra*.

² 18 & 19 Geo. V. c. 11, s. 5.

³ Part I. of Schedule.

messenger, or if the number of electors in the county exceeds 5000, then a number of clerks and messengers not exceeding in number one clerk and one messenger for every complete 5000 electors; and if there is a number of electors over and above any complete 5000 or complete 5000's of electors then one clerk and one messenger may be employed for such number, although not amounting to a complete 5000.

- (6) In a county, a number of clerks and messengers not exceeding in number one clerk and one messenger for each polling district in the county, or where the number of electors in a polling district exceeds 500, one clerk and one messenger for every complete 500 electors in the polling district; and if there is a number of electors over and above any complete 500 or complete 500's of electors, then one clerk and one messenger may be employed for such number, although not amounting to a complete 500: Provided always that the number of clerks and messengers so allowed in any county may be employed in any polling district where their services may be required.

714. A person employed primarily in one capacity is not prohibited from doing work in another capacity, so long as the employment is not a device to evade the Act. In *Elgin and Nairn*,¹ a polling clerk employed by the respondent, who had canvassed some voters in his private capacity as a citizen, was held entitled to have done so. But in *Rochester*² the employment of 300 persons ostensibly to assist in registration work, but really to act as canvassers, was held to be illegal. And in *Oxford*³ persons employed in the distribution of a special edition of a newspaper published in the interest of the respondent were held to be messengers.

(ii) *Other Legal Expenses.*⁴

715. (1) (Repealed.)

- (2) The personal expenses of the candidate.
- (3) The expenses of printing, of advertising, and of publishing, issuing, and distributing addresses and notices.
- (4) The expenses of stationery, messages, postages, and telegrams.
- (5) The expenses of holding public meetings.
- (6) In a borough the expenses of one committee-room, and if the number of electors in the borough exceeds 500, then of a number of committee-rooms not exceeding the number of one committee-room for every complete 500 electors in the borough, and if there is a number of electors over and above any complete 500 or complete 500's of electors, then of one committee-room for such number, although not amounting to a complete 500.
- (7) In a county, the expenses of a central committee-room, and in

¹ 1895, 5 O'M. & H. 10; 23 R. 178.

³ 1924, 7 O'M. & H. 49.

² 1896, Day's El. Cas. 103.

⁴ Part II. of Schedule.

addition of a number of committee-rooms not exceeding in number one committee-room for each polling district in the county, and when the number of electors in a polling district exceeds 500, one additional committee-room may be hired for every complete 500 electors in such polling district over and above the first 500.

716. The personal expenses of the candidate include his reasonable travelling expenses and the reasonable expenses of his living in hotels or elsewhere. No limit is put upon the amount to be expended, but any amount incurred exceeding £100 must be paid by and through the election agent. In *Rochester*¹ the rent of a house taken by the candidate for the period of the election was doubted as being a personal expense. In *Berwick-upon-Tweed*² the hiring of cars by the election agent to take speakers to meetings was held not to be a personal expense of the candidate, but doing so for himself presumably might be. In *Oxford*³ the question was considered but not decided whether a premium paid on an insurance policy to protect the candidate and election agent against accidents arising in connection with lent cars on the polling day was a personal expense.

717. The validity of the expenses incurred under the different heads of this Part is dealt with in considering what are corrupt and illegal practices and illegal payments.⁴ The election agent should keep an accurate record under each head of the expenditure actually incurred to protect himself from making any corrupt or illegal payment, and to enable him at once to apply to the Court, if necessary, for authority to make payment of any particular item, inadvertently incurred, of doubtful validity or for relief in respect of his having paid any such item.

(iii) *Maximum for Miscellaneous Matters.*⁵

718. Expenses in respect of miscellaneous matters other than those mentioned in Part I. and Part II. of the schedule must not exceed a maximum of £200, so, nevertheless, that such expenses are not incurred in respect of any matter or in any manner constituting an offence under the Act or any other Act, or in respect of any matter or thing, payment for which is expressly prohibited by the Act or any other Act.

(iv) *Maximum Scale.*⁶

719. The expenses mentioned above in Parts I., II., and III. of the schedule, other than personal expenses, and the fee, if any, paid to the election agent (not exceeding in the case of a county election £75, and in the case of a borough election £50—without reckoning for the purposes of that limit any part of the fee which may have been included

¹ 1892, Day's El. Cas. 103.

⁴ See paras. 762 *et seq.*, *infra*.

² 1923, 7 O'M. & H. 1.

⁵ Part III. of Schedule.

³ 1924, 7 O'M. & H. 49.

⁶ Part IV. of Schedule.

in the expenses first above mentioned) shall not exceed an amount equal—

in the case of a county election, to sixpence for each elector on the register;

in the case of an election for a borough, to fivepence for each elector on the register.

(v) *General*.¹

720. (1) Not applicable to Scotland.

- (2) For the purpose of the schedule, the number of electors shall be taken according to the enumeration of the electors in the register of electors.
- (3) Where there are two or more joint candidates at an election the maximum amount of expenses mentioned in Parts III. and IV. of the schedule shall for each of the joint candidates be the amount produced by multiplying a single candidate's maximum by one-and-a-half and dividing the result by the number of joint candidates.
- (4) Where the same election agent is appointed by or on behalf of two or more candidates at an election, or when two or more candidates by themselves or any agent or agents, hire or use the same committee-rooms for such election, or employ or use the services of the same sub-agents, clerks, messengers, or polling agents at such election, or publish a joint address or joint circular or notice at such election, those candidates shall be deemed for the purposes of this enactment to be joint candidates at such election :

Provided that—(a) The employment and use of the same committee-room, sub-agent, clerk, messenger, or polling agent, if accidental or casual, or of a trivial and unimportant character, shall not be deemed of itself to constitute persons joint candidates. (b) Nothing in this enactment shall prevent candidates from ceasing to be joint candidates. (c) Where any excess of expenses above the maximum allowed for one or two or more joint candidates has arisen owing to his having ceased to be a joint candidate, or to his having become a joint candidate after having begun to conduct his election as a separate candidate, and such ceasing or beginning was in good faith, and such excess is not more than under the circumstances is reasonable, and the total expenses of such candidate do not exceed the maximum amount allowed for a separate candidate, such excess shall be deemed to have arisen from a reasonable cause within the meaning of the enactments respecting the allowance by the Court of Session or election Court of an exception from the provisions of the Act, which would otherwise make an act an illegal practice, and the candidate and

¹ Part V. of Schedule.

his election agent may be relieved accordingly from the consequences of having incurred such excess of expenses.

Where a county or borough is divided, each division is considered a separate constituency.¹

721. In addition to the expenditure detailed above and not included in the maximum, a candidate—

- (1) where the nature of a county is such that any electors residing therein are unable at an election for such county to reach their polling place without crossing the sea or a branch or arm thereof, may provide means for conveying such electors by sea to their polling place, and the amount of payment for such means of conveyance may be in addition to the maximum amount of expenses allowed;²
- (2) at a Parliamentary election is, subject to regulations of the Postmaster-General, entitled to send, free of any charge for postage to each registered elector for the constituency, one postal communication containing matter relating to the election only, and not exceeding two ounces in weight: Provided that he may not be entitled to do so before he is duly nominated unless he has given such security as may be required by the Postmaster-General for the payment of postage in case he does not eventually become nominated;³ and
- (3) is entitled, for the purpose of holding a public meeting in furtherance of his candidature, to the use at all reasonable times between the receipt of a writ for the election and the day of the poll of a suitable room in any elementary school situated in the constituency for which he is a candidate, except any actual and necessary expenses incurred in respect of the preparation of the room before the meeting for the purpose of the meeting, and after the meeting for school purposes and for warming, lighting, and cleaning the room and defraying any damage done to the school-house or to the furniture, fittings, or apparatus therein,⁴ which will fall to be included in the election expenses.⁵

722. At the outset the election agent should take the number of the electors on the register of the constituency, being careful to deduct the local government electors included therein, and calculate from the scale the maximum amount he may expend with the view, not so much of spending up to the limit as of providing to keep within it. In *Oxford*⁵ an omission to deduct the local government electors led to an error in calculating the maximum which could legally be spent. It would also be prudent for the election agent to frame an estimate of expenditure for his guidance by taking the several items in Parts I. and II. of the

¹ 8 & 9 Geo. V. c. 64, s. 41 (1).

³ 8 & 9 Geo. V. c. 64, s. 33 (2).

⁵ *Oxford*, 1924, 7 O'M. & H. 49.

² 46 & 47 Vict. c. 51, s. 48.

⁴ *Ibid.*, s. 25 (1).

schedule, and apportioning under each the maximum sum he may safely allow to be spent.

SUBSECTION (3).—*When does Election begin?*

723. When the election begins is nowhere defined. In *Elgin and Nairn*¹ Lord Kyllachy said: "The legislature has confined the enactment to expenses which can be attributed to the conduct and management of the election; and these words, as it seems to me, at least suggest and contemplate an election which is not *in nubibus*, but is reasonably imminent. . . . Accordingly, while I think that the Act indicates plainly enough the kind of period which it contemplates, it contains nothing in the shape of hard-and-fast definition; and that being so, I apprehend the result is that it is left to us, as election judges, and it becomes our duty to consider each case with respect to its own facts, and to say in each case whether or not special circumstances exist requiring us to hold that the election began prior to what I call the normal period. In considering that question I apprehend we are to have regard to the whole facts—the nature of the work done and of the expenses incurred, the extent and amount of that work and of those expenses; the question how far the operations of the candidates were continuous up to the election or were intermittent, taking the shape merely of periodical visits to the constituency." And Lord M'Laren said:² "Conduct or management of such election means a definite election within the knowledge and contemplation of the parties who are engaged in conducting and managing it. . . . There may be a case of an unexpected death vacancy, when an election could not be in the thoughts of the people until the vacancy occurred; but there may be intermediate cases, and the late general election sufficiently illustrates my meaning—the case where there is a vote in the House of Commons adverse to the Ministry, and where from the moment when that vote is announced every one is looking forward to a dissolution of Parliament with a view to determining whether the Government of the day is to continue to enjoy the confidence of the country: I should certainly say that from that time the election had begun in the sense we are now considering. I do not say that it may not be begun at an even earlier period. If, for example, a candidate, not proceeding upon any public and patent facts but trusting to his own political sagacity and looking round the political horizon, thinks that an election is imminent, and proceeds to institute what is called a canvass of the constituency, which he continues without intermission down to the election, it may very well be that in such a case his own judgment as to when it is necessary to attend to his electoral interests shall be taken as fixing the commencement of that particular election. I think I have said enough to indicate

¹ 1895, 5 O'M. & H. 10, per Lord Kyllachy at p. 10; *sub. nom.* *Hood v. Gordon*, 1895, 23 R. 178, per Lord Kyllachy at p. 192.

² 5 O'M. & H. at p. 38; 23 R. at p. 186.

that in the view of the statute which I adopt it is impossible to lay down any definite term or to deal with this otherwise than as a question of fact in which the general political history of the period and the conduct of the individual candidate are both to be taken into account." In *Lancaster*,¹ Bruce J. expressed the view that Lord Kyllachy had laid down the true rule in *Elgin and Nairn*, and approved the last sentence quoted from Lord M'Laren's judgment. And in *Berwick-upon-Tweed* Avory J. quoted and adopted the views expressed by Lord M'Laren and Sankey J. concurred.² The prudent course in every case of doubt is to allow for and include any prior expenses in the account of expenses. If any expenses admittedly have been incurred and paid for before the appointment of the election agent, the money should be refunded and the payments made by the election agent.³

SUBSECTION (4).—*Payment of Expenses.*

(i) *By Whom to be made.*

724. Except as permitted by or in pursuance of the Act, no payment and no advance or deposit is to be made by a candidate or by any agent on his behalf, or by any other person at any time whether before, during, or after an election, in respect of any expenses incurred on account of or in respect of the conduct or management of the election otherwise than by or through the election agent of the candidate, whether acting in person or by a sub-agent; and all money provided by any person other than the candidate for any expenses, whether as gift, loan, advance, or deposit, is to be paid to the candidate or his election agent, with the proviso that the section is not to be deemed to apply to a tender of security to, or any payment by, the returning officer, or to any sum disbursed by any person out of his own money for any small expense legally incurred by himself, if such sum is not repaid him.⁴ The object of the section is to secure the payment of all election expenses through the election agent. The expression "small" sum in the proviso is not defined. In *Norwich*,⁵ a person who was not an election agent having paid £19, 10s. out of his own pocket for the posting and distribution of placards in the interest of the candidate, the amount was held too large to come under the proviso. In *Berwick-upon-Tweed*,⁶ sub-agents whose appointments had not been intimated to the returning officer one clear day before the day of nomination were held not to have contravened the section by having made payments.

(ii) *When Claims to be sent in.*

725. Every claim against a candidate or his election agent in respect of any expenses incurred on account of or in respect of the conduct or

¹ 1896, 5 O'M. & H. 45.

³ *Bodmin*, 1906, 5 O'M. & H. 225.

⁵ 1896, 4 O'M. & H. 84, at p. 89.

² 1923, 7 O'M. & H. 1.

⁴ 46 & 47 Vict. c. 51, s. 28.

⁶ 1923, 7 O'M. & H. 1.

management of such election must be sent in to the election agent within fourteen days after the day on which the candidates returned are declared elected. The days are reckoned inclusive of Sundays and holidays. Every claim which is not sent in to the election agent within the time limited by the Act—the fourteen days—is barred and must not be paid; and subject to such exception as may be allowed, an election agent who pays a claim in contravention of this enactment is guilty of an illegal practice.¹

(iii) *Period within which Payment to be made.*

726. All expenses incurred by or on behalf of a candidate at an election which are incurred on account of or in respect of the conduct or management of such election must be paid within twenty-eight days after the day on which the candidates returned are declared elected and not otherwise; and, subject to such exception as may be allowed in pursuance of the Act, an election agent who makes a payment in contravention of this provision is guilty of an illegal practice.² Where the election Court reports that it has been proved by a candidate that any payment made by an election agent in contravention of this section was made without the sanction or connivance of such candidate, the election of such candidate shall not be void and he shall not incur any of the disqualifications or penalties arising therefrom.³

(iv) *Disputed Claims.*

727. If the election agent disputes any claim sent in to him within the statutory period, or refuses or fails to pay it within the said period of twenty-eight days, such claim is to be deemed a disputed claim. The claimant may, if he thinks fit, bring an action for a disputed claim in any competent Court; and any sum paid by the candidate or his election agent in pursuance of a decree of the Court is to be deemed to be paid within the time limited by the Act and to be an exception from the provisions of the Act requiring claims to be paid by the election agent.⁴

(v) *Reference to Taxation of Claim against Candidate.*

728. If an action is brought to recover a disputed claim against a candidate or his election agent, and the defender admits liability, but disputes the amount of the claim, the said account shall, unless the Court on the application of the pursuer in the action otherwise direct, be forthwith referred to the Auditor for taxation, and the amount as taxed shall be the amount to be recovered in such action.⁵

¹ 46 & 47 Vict. c. 51, s. 29 (2), (3).

³ *Ibid.*, s. 29 (6).

⁵ *Ibid.*, s. 30.

² *Ibid.*, s. 29 (4), (5).

⁴ *Ibid.*, s. 29 (7), (8), (10).

(vi) *Payment allowed after Proper Time.*

729. On cause shewn to the satisfaction of the Court, the Court may, on application by the claimant or by the candidate or his election agent, by order give leave for payment by the candidate or his election agent of a disputed claim, or of a claim for election expenses sent in after the prescribed time, or although the same was sent in to the candidate and not to the election agent. Any sum paid by leave of the Court by the candidate or the election agent shall be deemed to be paid within the time limited by the Act.¹

730. The application is made by petition to one of the Divisions of the Court of Session or to the Lord Ordinary on the Bills in vacation. The petition is remitted to a Lord Ordinary, usually an election judge, to proceed and dispose of.² The dependence of the petition is intimated to the returning officer and published in the constituency as the Court may order. It is made under s. 23 of the Act, and cause shewn on which the Court must be satisfied is (a) that the act or omission of the candidate or of his election agent, or of any other agent or person, would by reason of its being a payment, engagement, employment, or contract in contravention of the Corrupt Practices Act, 1883, or of being the payment of a sum or the incurring of expense in excess of the maximum amount allowed by the Act, or of otherwise being in contravention of the Act be, but for the section, an illegal practice, payment, employment, or hiring; and (b) that such act or omission arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith.

731. Good faith is the basis of the application. This section does not authorise the granting of relief for any corrupt practice.³ When an election petition is pending against the return of the applicant, the application will be continued until after the trial.⁴ In *Walsall*⁵ the Court refused an application for relief stated to be in respect of certain matters, if found by the Court to be illegal. A petition by certain election agents for authority to pay accounts of a returning officer, which were admittedly due, but had not been paid within the statutory time, was granted *de plano*.⁶ But in an application by a candidate for leave to pay certain accounts rendered after the prescribed period, the Court, while in respect that the amount was small and that no prolonged inquiry was necessary, remitting the accounts to the Auditor, observed that the remit was so made only in the special circumstances, and that the case could not be regarded as a precedent.⁷ On the application for relief being granted by the Court, the candidate, election agent, or other person is discharged from any of the consequences under the Act of the act or omission admitted.⁸

¹ 48 & 49 Vict. c. 51, s. 29 (9), (10).

² *Clark v. Sutherland*, 1896, 24 R. 183.

³ *Birkbeck v. Bullard* (Norwich case) 1886, 54 L.T. 625.

⁴ *Oxford*, 1924, 7 O'M. & H. 49.

⁵ 1892, Day's El. Cas. 77.

⁶ *Kyd and others, Petrs.*, 1886, 23 S.L.R. 288.

⁷ *Macfarlane, Petr.*, 1886, 23 S.L.R. 649.

⁸ 46 & 47 Vict. c. 51, s. 23.

SUBSECTION 5.—*Candidate's Personal Expenses and Petty Disbursements.*

732. There are two payments which can be made otherwise than through the election agent:

1. The personal expenses of the candidate not exceeding £100,¹ but the candidate must send to the election agent within the statutory time for sending in claims a written statement of the amount of such personal expenses paid as aforesaid; and
2. Payments made by any person authorised in writing by the election agent in respect of necessary expenses for stationery, postage, telegrams, and other petty disbursements not in excess of the total sum named in the authority.² A person so authorised must, within the prescribed period for sending in claims, send to the election agent a statement of the particulars of payments so made by him as authorised, and the same shall be vouched for by a bill containing the receipt of that person. In *West Bromwich* ³ an agent, having received from the election agent £9 for petty disbursements, was held to have illegally paid out of that sum all the expenses incurred in connection with his ward and committee-room.

SECTION 20.—RETURN AND DECLARATION RESPECTING ELECTION EXPENSES.

SUBSECTION (1).—*Form of Return.*

733. The election agent of every candidate must, within thirty-five days after the day on which the candidates returned at an election are declared elected, transmit to the returning officer a true return respecting election expenses in the form prescribed in the Second Schedule to the Act containing, as respects that candidate:

- (a) a statement of all payments made by the election agent, together with all the bills and receipts;
- (b) a statement of the amount of personal expenses, if any, paid by the candidate;
- (c) (repealed;)
- (d) a statement of all other disputed claims, of which the election agent is aware;
- (e) a statement of all the unpaid claims, if any, of which the election agent is aware, in respect of which application has been or is about to be made to the Court;
- (f) a statement of all money, securities, and equivalent of money received by the election agent from the candidate or any other person for the purpose of expenses incurred or to be incurred on account of or in respect of the conduct or manage-

¹ 46 & 47 Vict. c. 51, s. 31 (1).

² *Ibid.*, s. 31 (2).

³ 1911, 6 O'M. & H. 288.

ment of the election, with a statement of the name of every person from whom the same may have been received.¹

734. The word "transmit" means "send," or "remit," and does not mean "lodge." If the return is posted within the thirty-five days the section is complied with although it does not reach the returning officer until after the expiration of that period.²

735. The return requires to be made with great care and exactness. In each case the name, address, and description of the person, and particulars of the goods, work, labour, or services in respect of which he is paid must be set out, and the rooms hired for public meetings or committee-rooms and the persons paid for their use must be named and described sufficiently for their identification. The object of the Act is that the other side in the election, and the public at large should be properly informed in respect of every payment which is made, whether it be of one character or another. In numerous cases returns have been held not to fulfil the statutory requirements through failure to give the specified details. In *Norwich*³ the names, addresses, and description of clerks and messengers were not inserted. In *Buckrose*⁴ the names of the persons from whom rooms had been hired were omitted. In *Berwick-upon-Tweed*⁵ the election was avoided, *inter alia*, through the insufficient description of the clerks and messengers, and no proper description of the rooms and halls hired being in the return, and the name of a person to whom an unpaid claim was due having been omitted. And in *Oxford*⁶ the election was avoided, *inter alia*, also owing to no description of clerks, messengers, and persons who supplied goods being given in the return.

SUBSECTION (2).—*Declaration by Election Agent.*

736. The return transmitted must be accompanied by a declaration made by the election agent before a Justice of the Peace in the form in the Second Schedule to the Act referred to as a declaration regarding election expenses.⁷ When the candidate is his own election agent he makes the declaration as modified in the Second Schedule in substitution for the declaration of the election agent.⁸

SUBSECTION (3).—*Declaration by Candidate.*

737. The candidate must, at the time when the election agent transmits his return, or within seven days afterwards, transmit to the returning officer a declaration made before a Justice of the Peace in the form in the first part of the Second Schedule.⁹ Where the candidate is out of the United Kingdom when the agent transmits his return, the declaration may be made by the candidate within fourteen days after his return to the United Kingdom and must then be forthwith trans-

¹ 46 & 47 Vict. c. 51, s. 33 (1).

³ 1886, 4 O'M. & H. 90.

⁵ 1923, 7 O'M. & H. 1.

⁷ 46 & 47 Vict. c. 51, s. 33 (2).

² *Mackinnon v. Clark*, [1898] 2 Q.B. 251.

⁴ *Ibid.*, 118.

⁶ 1924, 7 O'M. & H. 49.

⁸ *Ibid.*, s. 33 (3).

⁹ *Ibid.*, s. 33 (4).

mitted to the returning officer.¹ The delay so authorised to the candidate does not extend to the election agent, who must timeously make and transmit his declaration.

SUBSECTION (4).—*Disability of Candidate from Failure to Transmit.*

738. If the return and declarations are not transmitted before the expiration of the time limited for the purpose, the candidate is not after the expiration of the time to sit or vote in the House of Commons until the same have been transmitted, or until an allowance of an authorised excuse for the failure to transmit the same has been obtained.² If he does sit or vote, he forfeits £100 for every day on which he so sits or votes to any person who sues for the same.³

SUBSECTION (5).—*Relief to Candidate or Election Agent.*

739. Where the return and declarations have not been transmitted within the time specified, or being transmitted contain some error or false statement, then the Court may—

- (a) if the candidate applies and shews that the failure has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or assistants; or
- (b) if the election agent applies and shews that the failure has arisen by reason of his illness, or the death or illness of any prior election agent of the candidate, or of the absence, death, illness, or misconduct of any sub-agent or of any assistants; and
- (c) in either case if the failure has arisen by reason of inadvertence or any reasonable cause of a like nature, and not by reason of any want of good faith,

on being satisfied of the good faith of the application, make an order allowing an authorised excuse for the failure to transmit such return and declarations or for an error or false statement in such return and declaration as to the Court may seem just.⁴

Before granting such allowance, the Court may order any election agent or sub-agent through whose default the candidate or election agent has been unable to comply with the requirements of the statute to attend before the Court to make the return and declaration or to state the particulars required to enable the same to be made, and in default may order him to pay a fine not exceeding £500.⁵

740. The scope and effect of ss. 33 and 34 under which applications for relief are made have been considered in the cases undernoted.⁶ The petitioner must admit in his petition that he has contravened the statute.⁷ Any elector may appear and oppose. It is competent for a respondent to shew that items have been omitted from the return

¹ 46 & 47 Vict. c. 51, s. 33 (8).

² *Ibid.*, s. 33 (5).

³ *Bradlaugh v. Clarke*, 1883, 8 App. Cas. 357; *Mackinnon v. Clark*, [1898] 2 Q.B. 251.

⁴ 46 & 47 Vict. c. 51, s. 34 (1).

⁵ *Ibid.*, s. 34 (2).

⁶ *Clark v. Sutherland*, 1896, 24 R. 183; *Smith and Sloan v. Mackenzie*, 1919 S.C. 546; *Munro and M'Mullen v. Macintosh*, 1920 S.C. 218; *Pole and Scanlon, Petrs.*, 1921 S.C. 98.

⁷ *Clark v. Sutherland, supra*.

other than those for which relief is asked, since these may have a bearing on whether the petitioner has acted in good faith and from inadvertence.¹ "Inadvertence means negligence or carelessness where the circumstances shew an absence of intention to disobey the law."² Deliberate disregard of the statute will not be excused. The petition cannot be amended to include items not mentioned in the original application.¹ The Court will deal more strictly with a professional man or one who has had previous election experience than with a layman who has had no such experience.³ But an election agent is not entitled to undertake the duty without acquainting himself with his obligations, and it may now be taken that ignorance of his duties will not afford a sufficient excuse for an election agent.⁴ The petition will more readily be granted if (1) the illegal practice was not one which the candidate or his agent had any interest to commit or which was likely to affect the return of the candidate, and (2) the applicant when the mistake was discovered has not treated it lightly or defiantly but has done what he could to put it right.⁵

741. When leave is granted for payment of claims a return must, within seven days after payment, be made by the candidate or his election agent to the returning officer, accompanied by a copy of the interlocutor giving leave.⁶

SUBSECTION (6).—*Publication of Summary of Returns.*

742. The returning officer, within ten days after receiving from the election agent of a candidate a return respecting election expenses, must publish a summary of the return in not less than two newspapers circulating in the county or borough for which the election was held, with a notice of the time and place at which the return and declarations (including the accompanying documents) can be inspected.⁷ The return and declarations (including the accompanying documents) must be kept at the office of the returning officer or some convenient place appointed by him for two years, during which they are to be open to inspection at reasonable times to any person on payment of a fee of one shilling, and copies thereof or part thereof furnished at the price of twopence for every seventy-two words. After the expiration of the said two years, the returning officer may cause the return and declarations (including the accompanying documents) to be destroyed, or if the candidate or his election agent so require, shall return the same to the candidate.⁸

SECTION 21.—EXPENSES OF RETURNING OFFICER.

743. The expenses of the returning officer were formerly paid by the candidates jointly. The payment of these expenses is now regu-

¹ *Clark v. Sutherland, supra.*

² *Munro and M'Mullen v. Mackintosh, supra*, per Lord Mackenzie.

³ *Smith and Sloan v. Mackenzie, supra*; *Munro and M'Mullen, supra.*

⁴ *Pole and Scanlon, supra.*

⁶ 46 & 47 Vict. c. 51, s. 33 (9).

⁵ *Smith and Sloan, supra*, per Lord Guthrie.

⁷ *Ibid.*, ss. 35 (1), 35 (2).

⁸ *Ibid.*, s. 35 (2).

lated by s. 29 of the Representation of the People Act, 1918. The returning officer at a parliamentary election (other than a University election) is entitled to payment for his reasonable charges, not exceeding the sums specified in the scale of maximum charges the Treasury are authorised from time to time to frame, in respect of services and expenses of the several kinds mentioned in the scale which have been properly rendered or incurred by him for the purposes of or in connection with the election.¹ The existing Treasury Order prescribing a scale of maximum charges is dated 9th September 1924.² The charges are to be paid out of the Consolidated Fund on an account being submitted to the Treasury in accordance with their regulations. The Treasury may have the account taxed by the Auditor of the Court of Session. The returning officer may apply to the Auditor to examine any claim made by any person against him in respect of matters charged in the account; and the Auditor, after notice given to the claimant and after giving him an opportunity to be heard and to tender any evidence, may allow or disallow or reduce the claim objected to, with or without costs. The determination of the Auditor is final.

SECTION 22.—UNIVERSITY ELECTIONS.

SUBSECTION (1).—*Nomination.*

744. The nomination of candidates is to take place on such day and at such time and place as may be fixed by the returning officer, being not less than four days nor more than eight days after receipt of the writ, and he must give public notice of the day, time, and place within three days of the receipt of the writ.³ The candidate must be nominated by two electors as proposer and seconder and by eight other electors as assenting to the nomination, and his nomination must be delivered to the returning officer by some elector.⁴

SUBSECTION (2).—*Polling.*

745. The poll is to remain open for not less than four days nor more than six days, and is to take place on such days as may be fixed by the returning officer, commencing not more than twenty and not less than twelve clear days after the day of nomination.⁵ The poll at each University shall be open at such place and for such time each day between the hours of 8 a.m. and 8 p.m., not being less than four hours, as the Vice-Chancellor of the University may direct and of which he must give public notice.⁶

746. The Vice-Chancellor of each University acts as presiding officer at the University and has general control over the arrangements for the conduct of the poll at such University.⁷ The Vice-Chancellor of each University shall as regards the voting papers relating to such University decide on the validity of any voting paper to which objection is taken, or on the right of any person to vote, and the decision of the

¹ 1918 Act, s. 29 (1). ² S.R. & O., 1924, No. 1031, s. 68. ³ 8 & 9 Geo. V. c. 64, s. 4.

⁴ *Ibid.*, s. 5.

⁵ *Ibid.*, s. 10.

⁶ *Ibid.*, s. 11.

⁷ *Ibid.*, s. 15.

Vice-Chancellor, if the voting paper or the right to vote is allowed, shall be final, but, if the voting paper or the right to vote is disallowed, it shall be subject to reversal on any proceeding questioning the election or return.¹ The register kept in pursuance of the Act by the University Court shall be conclusive as to the right of any person to vote at the poll; but this provision shall not entitle any person to vote, if that person is subject to any legal incapacity.²

SUBSECTION (3).—*Method of Voting.*

747. Votes must be given by means of voting papers, and no elector is allowed to vote in person, or in any other way than is provided therefor. . . .³ Sec. 20 of the 1918 Act enacts: At a contested election for a University constituency when there are two or more members to be elected, any election of the full number of members is according to the principle of proportional representation, each elector having one transferable vote. The expression “transferable vote” means a vote (a) capable of being given so as to indicate the voter’s preference for the candidates in order; and (b) capable of being transferred to the next choice, when the vote is not required to give the prior choice the necessary quota of votes, or where, owing to a deficiency in the number of the votes given for a prior choice, that choice is eliminated from the list of candidates.⁴

SUBSECTION (4).—*Conduct of Election.*

748. The conduct of elections for University constituencies is regulated by s. 32 of the 1918 Act, and the following provisions apply:—

(1) The provisions contained in Part II. of the Fifth Schedule.

Regulations may be made by Order in Council for giving full effect to these provisions and for the effective and proper conduct of these elections.

(2) Part III. of the Act [Method and Costs of Elections] except as expressly provided. The following modifications shall have effect:—

(a) “Voting paper” shall be substituted for “ballot paper,” and for any reference to the Ballot Act, 1872, there shall be substituted a reference to the corresponding provisions of the 1918 Act or regulations made thereunder in relation to University constituencies or University elections.

(b) It shall not be necessary to prepare an absent voters list, but the right to vote by proxy may be exercised by any person who would be entitled to exercise such right, if his name were entered on an absent voters list, so long as all other conditions enabling

¹ 8 & 9 Geo. V. c. 49, s. 15.

² 8 & 9 Geo. V. c. 64, s. 17.

³ Schedule V., Pt. ii., s. 16.

⁴ *Ibid.*, s. 41 (6).

him to vote by proxy are fulfilled. The procedure in appointing proxies is detailed in a special order.¹

749. Part II. of the Fifth Schedule, amplified by the University Elections Regulations, 1918, and the University Elections (Miscellaneous Provisions) Order, 1918, furnish a complete code for the conduct and management of the combined Scottish University election. Specific directions are given as to the issue of voting papers, the method to be adopted by voters in voting, and the conduct of the poll. Detailed directions are given and regulations made regarding counting of votes, and ascertainment of the result of the polling according to the application of the principle of proportional representation.

SUBSECTION (5).—*Vote by Returning Officer.*

750. Where an equality of votes is found to exist between any candidates on a final count, and the addition of a vote would entitle any of those candidates to be declared elected, the returning officer may give a deciding vote, but the returning officer shall not be entitled to vote at the election in any other case.²

SUBSECTION (6).—*Public Notice of Result of Election.*

751. In publishing the result of the election, the returning officer shall include a notification of any transfer of votes made under the regulations, and of the total number of votes credited to each candidate after such transfer.³

SUBSECTION (7).—*Return.*

752. The return of a member or members to serve in Parliament for a University constituency shall be made by a certificate of the names of such member or members under the hand of the returning officer endorsed on the writ of election.⁴

SUBSECTION (8).—*Expenses of Election.*

753. Any expenses reasonably incurred by the Vice-Chancellor of each University in connection with the arrangements for an election shall be paid to him by that University: Provided that any expenses so incurred by the returning officer in connection with the nomination and the counting of votes shall be paid in equal shares by the four Universities forming the constituency.⁵

Any candidate's deposit which is forfeited shall be divided equally among the Universities forming the Scottish University constituency, and the share of the deposit received by each University shall be paid into the fund out of which the election expenses of that University are defrayed.⁶

¹ The Proxy Paper (Universities) Order, 1921; S.R. & O., 1921, No. 2062.

² 1918 Act, Schedule V., Pt. ii., Rule 28.

³ S.R. & O., 1918, No. 1348, Rule 13. ⁴ *Ibid.*, No. 1349, Rule 4. ⁵ 1918 Act, s. 34.

⁶ S.R. & O., 1918, No. 1349, s. 5.

SECTION 23.—VOIDANCE OF AN ELECTION.

754. At common law an election is avoided either (a) where there has been no election in the eye of the law, or (b) where, though there has been an election it has not been conducted in accordance with the requirements of the existing law.¹ Corruption arising from general bribery, general treating, and general intimidation may void an election quite apart from acts of the candidate or his agent, because it would be carried on contrary to the principle of the law.² Irregularities in the conduct of the election attributable to the returning officer or his officials vitiate an election, but these must be substantial and of a character that would materially affect the result of the election.³ Or an election may be vitiated through an error by the returning officer in the counting or admission or rejection of votes, where a recount or scrutiny may convert an apparent majority of votes into a minority. In none of these cases would a challenge or avoidance of an election be attributable to any fault or actings of the candidate.

PART IV.—CORRUPT AND ILLEGAL PRACTICES.

SECTION I.—STATUTORY PROVISIONS.

755. To ensure the purity of elections and to prevent illegitimate means being used by candidates to interfere with the freedom of the electorate, certain statutory restrictions and limitations have been imposed upon candidates. These are embodied in the Parliamentary Elections Act, 1868,⁴ and the Corrupt and Illegal Practices Prevention Act, 1883,⁵ the non-observance of which may not only void an election, but also render parties liable to serious penal consequences. The latter Act incorporated the provisions of the Corrupt Practices Prevention Act, 1854,⁶ and of other statutes dealing with election offences, and practically codified the law as affecting not only candidates, but also all other persons who interfered by illegal methods directly or indirectly in the conduct of elections. A novelty introduced in the statute was the distinction between a corrupt practice and an illegal practice. The distinction drawn has been thus defined: "A corrupt practice is a thing which the mind goes along with. An illegal practice is a thing the legislature is determined to prevent, whether it is done honestly or dishonestly,"⁷ to which, however, an exception must now be made in the corrupt practice arising from the holding of meetings and the issue of literature on behalf of a candidate unauthorised by the election agent.⁸

¹ *Deans v. Mags. of Haddington*, 1882, 9 R. 1077; *Woodward v. Sarsons*, 1875, L.R. 10 C.P. 733.

² *Guildford*, 1869, 1 O'M. & H. 13, per Willes J. at p. 15; *Bradford*, 1869, 1 O'M. & H. 35, per Martin B. at p. 41.

³ *Deans v. Mags. of Haddington*, *supra*; *Woodward v. Sarsons*, *supra*.

⁴ 31 & 32 Vict. c. 125.

⁵ 46 & 47 Vict. c. 51.

⁶ 17 & 18 Vict. c. 102.

⁷ *Barrow-in-Furness*, 1886, 4 O'M. & H. 76, per Field J.

⁸ 1918 Act, s. 34.

SECTION 2.—RESPONSIBILITY OF CANDIDATE FOR AGENTS' ACTINGS.

756. Before considering what corrupt or illegal practices and by whom practised will void an election, the principle of agency as affecting a candidate may be adverted to. It is enacted that if a report is made on an election petition that any candidate at such election has been guilty by his agents of any corrupt practice his election shall be void.¹ The responsibility of a candidate for the actings of his duly appointed election agent and sub-agents is undoubted. A more difficult question, and one of the utmost importance which frequently arises, is when unauthorised persons by their actings and relations with the candidate are to be held impliedly agents of the candidate so as to render him liable for their actings.

757. Agency is nowhere defined and is a question of fact.² But it is directed that the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions are to be observed so far as may be by the Court in the case of election petitions under the Act, and this has been followed by the election judges. The difficulty is to define what are the principles upon which agency is to be held to be proved. The law has been stated thus: "The principle of agency is that if a man is employed at an election to get you votes, or if without being employed he is authorised to get you votes, or if, although neither employed nor authorised, he does to your knowledge get you votes, and you accept what he has done and adopt it, then he becomes a person for whose acts you are responsible in the sense that if his acts have been of an illegal character you cannot retain the benefit which those illegal acts have helped to procure for you. . . . Now that is, as I apprehend, clearly established law. It is hard upon candidates in one sense, because it makes them responsible for acts which are not only not in accordance with their wish but which are directly contrary to it."³

758. It has never been clearly determined what degree of evidence is required to establish agency. "It is clear that a person is not to be made an agent by his merely acting—that is not enough—he must act in promotion of the election; and he must have authority or there must be circumstances from which we can infer authority."⁴ The sufficiency of the evidence requisite differs according to the degree of agency and the circumstances in which it is sought to be established. "As you go lower down you require more distinctly to shew that the act was done by a person whom the candidate would be responsible for; as you come higher up it is more as if the candidate had done it himself."⁵

759. The relation between a candidate and canvassers is one of

¹ 46 & 47 Vict. c. 51, s. 5.

² *Salford*, 1869, 1 O'M. & H. 133; *East Clare*, 1892, 4 O'M. & H. 162.

³ *Great Yarmouth*, 1906, 5 O'M. & H. 178, per Channell J.

⁴ *Stroud*, 1874, 3 O'M. & H. 7, per Piggott B. at p. 11.

⁵ *Hereford*, 1869, 1 O'M. & H. 194, per Blackburn J.

degree. Mere canvassing by a single individual outwith the candidate's presence, or even possession of a canvass-book, is not enough, but if a person has canvassed in the presence of the candidate or of his authorised agent, agency will be inferred.¹ As to canvassers generally, Lord Barcaple said: "There is the class of cases where, it being proved that a candidate is having his election carried on by . . . certain canvassers, those canvassers do something which, if the candidate is responsible for it, will invalidate the election, and it is held that he is responsible for it in the sense of making the validity of the election depend upon it. I do not see how these election petitions would be of the least use otherwise, because I suppose there are very few candidates indeed who undertake the practice of corruption by their own hand. I presume there are equally few candidates, or very nearly so, who ever say to their agents that they are to proceed corruptly in the matter."²

760. The position of a candidate in relation to political associations and clubs is always a delicate one. A political association existing for the purpose of a political party in a burgh, by merely advocating the cause favourable to a particular candidate and distributing literature and holding meetings, while largely contributing to the success of the candidate would not be held identified with him so long as it was an independent agency acting on its own behalf with no privity with the candidate or his agents. On the other hand, a political association in a burgh advocating the views of a candidate, of which that candidate is not a member, to the funds of which he does not subscribe, and with which he personally is not ostensibly connected, but at the same time in intimate relationship with his agents, is utilised by them for the purpose of carrying out his election, interchanging and communicating information with his agents respecting the canvassing of votes and the conduct of the election, and largely contributing to the result. To say that the candidate is not responsible for any corrupt acts done by an active member of such an association would be repealing the Corrupt Practices Act, and sanctioning a most effective system of corruption.³ A distinction has been drawn in the case of a candidate attending a meeting of an association existing for a particular object, such as a temperance association, or a licensed victuallers' association, and explaining or advocating his views, which *per se* would not be sufficient to make either of these bodies one of his agents; nor would independent meetings of these bodies or distribution of literature by them do so even although the candidate profited thereby.⁴ It is thought, however, that all such meetings or propaganda would now be held illegal unless authorised in writing by the election agent of the candidate.⁵ Where a candidate has handed over to or passively acquiesced in an election being

¹ *Bolton*, 1874, 2 O.M. & H. 138, at p. 141; *Wigan*, 1881, 4 O.M. & H. 1, at p. 12.

² *Greenock*, 1869, 1 O.M. & H. 246, at p. 251.

³ *Bewdley*, 1880, 3 O.M. & H. 145, per Lopes J. at pp. 146, 147.

⁴ *St. George's*, 1895, 5 O.M. & H. 89, per Pollock B. at pp. 97, 98.

⁵ 1918 Act, s. 34; *Rex and Hailwood v. Hailwood & Ackroyd, Ltd.*, [1928] 2 K.B. 277.

dominated and managed by a body of priests in his interest they have been held to be his agents, so as to make him liable for their actings.¹

761. A candidate is not responsible for the acts of a person who has acted as if he were an accredited agent if he has repudiated him. Neither is he responsible for the actings of a treacherous agent.²

762. The commencement of agency is in every case a question of circumstances and must be defined within reasonable limits. In fixing the period to commence from the time when the candidate first announced his intention to present himself as a candidate at the next ensuing election, Hawkins J. said: "I think that when an election is contemplated as probable in the course of a few months, and it is well recognised that to secure the election of a particular candidate active steps must be taken, and every exertion made at once to secure that object, it cannot reasonably be said that there can be no agency to take such steps or to make such exertions until the immediate approach of the election by the issuing of the writ."³ Agency terminates with the declaration of the poll. An election is voided and the seat forfeited if a candidate by himself or in certain circumstances by his agents is found to have committed any corrupt practice or illegal practice.

SECTION 3.—CORRUPT PRACTICES.

SUBSECTION (1).—*Bribery.*

763. The following persons are, as defined in the Corrupt Practices Prevention Act, 1854,⁴ to be deemed guilty of bribery:

- (1) Every person who shall directly or indirectly give, lend, agree to give, agree to lend, offer, promise, promise to procure, promise to endeavour to procure any money or valuable consideration, to or for any voter, to or for any person on behalf of any voter, or to or for any other person, to induce any voter to vote or refrain from voting, or shall corruptly do any such act on account of such voter having voted or refrained from voting.
- (2) Every person who shall directly or indirectly give, procure, agree to give, agree to procure, offer, promise, promise to procure, promise to endeavour to procure any office, place, or employment, to or for any voter, to or for any person on behalf of any voter, or to or for any other voter to induce such voter to vote or refrain from voting, or shall corruptly do any such act on account of any voter having voted or refrained from voting.
- (3) Every person who shall directly or indirectly give, lend, agree to give, agree to lend, offer, promise, promise to procure, promise to endeavour to procure any money, valuable consideration, office, place, employment to or for any person in order to induce such person to procure or endeavour to procure the return of any person, or vote of any voter.

¹ *North Meath*, 1892, 4 O'M. & H. 185; *South Meath*, 1892, 4 O'M. & H. 130.

² *Londonderry*, 1869, 1 O'M. & H. 274, at p. 278.

³ *Walsall*, 1892, 4 O'M. & H. 123, at p. 125.

⁴ 17 & 18 Vict. c. 102.

- (4) Every person who shall, in consequence of any such gift, loan, offer, promise, procurement or agreement, procure, engage, promise, or endeavour to procure the return of any person or the vote of any voter.
- (5) Every person who shall advance, pay, or cause to be paid any money to or to the use of any other person, with the intent that such money or any part thereof should be expended in bribery; or who shall knowingly pay, or cause to be paid, any money to any person in discharge or repayment of any money wholly or in part expended in bribery; but this shall not extend to any money paid or agreed to be paid for or on account of any legal expenses *bona fide* incurred at or concerning any election.
- (6) Every voter who shall, before or during an election directly or indirectly receive, agree for, contract for any money, gift, loan, valuable consideration, office, place, or employment for himself or for any other person for voting, for agreeing to vote, for refraining from voting or for agreeing to refrain from voting.
- (7) Every person who shall after an election directly or indirectly receive any money or any valuable consideration on account of any person having voted or refrained from voting, or on account of having induced any other person to vote or to refrain from voting.¹

764. The first five cases deal with different methods of bribing by the briber, the last two cases have reference to the recipient of the bribe. In every case the question is, was the person actuated by an honest or dishonest motive? Was the act done or the promise made for the purpose of inducing the voter to vote or refrain from voting or was it instigated by disinterested kindness, generosity, or charity? The governing principle of the transaction can only be determined by the inferences in fact to be derived from what the person said and did.²

765. Cases 1 and 2 deal with the actings of the briber with the individual voter. An offer to bribe is sufficient, and it is immaterial whether it has been accepted or not,³ but stronger evidence is required than where some clear, definite act has followed the alleged offer or conversation.⁴ So also is a promise to bribe, whether it be of a payment of money or to procure an office or employment.⁵ An offer to pay the travelling expenses of a voter conditionally upon his voting for a particular candidate is bribery, but not a mere request to a voter to come and vote without any candidate being indicated, whatever may be the expectations of the voter, although it would be an illegal practice.⁶ A promise of a

¹ 17 & 18 Vict. c. 102, ss. 2 and 3.

² *Launceston*, 1874, 2 O'M. & H. 129, at p. 133; *Kingston-on-Hull*, 1911, 6 O'M. & H. 372 at p. 378.

³ *Coventry*, 1869, 1 O'M. & H. 97, at p. 107.

⁴ *Mallow*, 1870, 2 O'M. & H. 18, per Morris J. at p. 22; approved, *Carrickfergus*, 1880, 3 O'M. & H. 90, per Harrison J. at p. 92.

⁵ *Horsham*, 1876, 3 O'M. & H. 52; *Salisbury*, 1880, 3 O'M. & H. 130, at p. 132; *Ipswich*, 1886, 54 L.T. 619.

⁶ *Cooper v. Slade*, 1857, 6 H.L.C. 746; *Bolton*, 1874, 2 O'M. & H. 138, at p. 145; *Pontefract*, 1893, 4 O'M. & H. 200.

refreshment to a voter to induce him to vote is bribery, apart from any question of treating.¹

766. In Case 1 the consideration is any gift or loan or valuable consideration. The gift need not be in money. A valuable consideration may be the equivalent; as buying goods above their value if done to secure votes; a candidate giving tickets to be exchanged for money by his agents; ² a candidate, the sitting member, on eve of the poll, giving leave to his tenants to destroy and sell an excess quantity of rabbits on his estate, having on previous occasions refused to do so.³ Lavishly spending money amongst the tradesmen of a constituency will be held to be corruptly done if it is shewn to have for its object the securing of political support.⁴

767. Subscriptions to charities are not bribery in the absence of corrupt intention,⁵ but it may be a question of great difficulty to determine when such contributions and others of a like nature are or are not bribery. A benevolently-minded sitting member or candidate may distribute charity in a constituency without being guilty of bribery, even if he has in his mind that in so doing he will increase his popularity. But such gifts, innocent in their inception even if continuing a former custom, may be vitiated by the time—when an election is imminent—or the method by which they are made as through or controlled by an election agent. The ruling principle has been stated thus: In each case the question arises whether the distribution of charity was done honestly or whether it was done corruptly, and the Court must take the whole of the evidence into consideration and inquire whether the governing principle in the mind of the man who made such gifts was that he was doing something with a view to corrupt the voters; or whether he was doing something which was a mere act of kindness.

768. In *Plymouth*,⁶ the respondent during the years he had been a member had been in the habit periodically of sending substantial sums of money to be distributed amongst the poor on special occasions, and on one occasion he sent mattresses and bedding, giving the mayor an absolute control as to the distribution. In *Lichfield*,⁷ two years before the election, the respondent contributed £250 for the relief of miners, but his name was not disclosed until during the election when a bill was published by his election agent inviting the miners' support in consequence of that contribution. In *East Nottingham*,⁸ the then member in 1910, owing to great distress in the constituency, determined to actively assist in its alleviation, and owing to the number of applications, handed the details to the care of his election agent; in December 1910, on the election becoming imminent, the election agent, on the

¹ *Bodmin*, 1869, 1 O.M. & H. 124; *Montgomery*, 1892, 4 O.M. & H. 69.

² *Cockermouth*, 1853, 2 Pow. R. & D. 164; *Huddersfield*, 1859, W. & Br. 28; *Canterbury City*, 1853, 2 Pow. R. & D. 14.

³ *Launceston*, 1874, 2 O.M. & H. 129.

⁴ *Aylesbury*, 1886, 4 O.M. & H. 59.

⁵ *Westbury*, 1869, 1 O.M. & H. 47.

⁶ 1880, 3 O.M. & H. 107.

⁷ 1869, 1 O.M. & H. 22.

⁸ 1911, 6 O.M. & H. 300.

member's instructions, instructed postponement of consideration of outstanding applicants' claims until after the election. In *St. George's*,¹ the respondent in the winter of 1894-95, in a time of distress, became president of a philanthropic society which issued 13,600 tickets, many of which bore the respondent's name, to necessitous persons, entitling the holders to food and coal. In all these cases bribery was alleged against the respondent or his agent, but the Court held that the respondents were entitled to take advantage of any popularity they had acquired and that there was no evidence of any corrupt motive.

769. On the other hand, bribery was held proved in the following case. In *Bolton*² the respondent, the former member, residing in the constituency, was in the habit of giving largely to charities, and in December, a month before the dissolution, determined to make a distribution of 150 tons of coal among the deserving poor irrespective of sex or political creed. Without his knowledge, printed cards bearing to be with his compliments were issued early in January with the coal by the person who became his election agent, and the election was voided in consequence. In *Wigan*,³ where breakfasts of bread and cheese were given on the polling day to necessitous persons owing to the distress existing consequent upon a strike, the election was voided. In *Kingston-upon-Hull*⁴ the respondent in the summer of 1910 determined to celebrate in some way his completing twenty-five years as member in the constituency. Ultimately on 9th November, when no election was in contemplation, he agreed to have a reception, and an entertainment on 3rd December for children, with a gift of sweets, and to distribute through the Guardians a bag of coal to all in receipt of outdoor relief. On 14th November he intimated that in consequence of an election being imminent the reception would have to be abandoned. On 18th November the dissolution was announced for 28th November and the date of the entertainment for children was accelerated and held on 26th November, when each box of sweets had an inscription stating it was a gift from the respondent M.P. for Central Hull, 1885-1910. The distribution of coal was also made, and of the recipients 64 were voters and 136 lived in houses with voters. The election was voided.

770. In Case 2, the inducement is to give or promise any office, place, or employment. A mere promise to procure a situation may be bribery,⁵ and an offer to secure a seat in the town council for a voter in a parliamentary election has been held bribery.⁶ Questions arising out of employment are somewhat difficult. What may be sufficient to constitute an illegal practice may fall short of bribery. The real test whether the employment amounts to bribery is—Was the employment *bona fide*, a real transaction of payment made in return for adequate services rendered, or was it a colourable transaction where the employment was merely a means of making a payment to induce a voter to vote?

¹ 1895, 5 O'M. & H. 89.

² 1881, 4 O'M. & H. 1.

³ *Lichfield*, 1869, 1 O'M. & H. 22.

⁴ 1874, 2 O'M. & H. 138.

⁵ 1911, 6 O'M. & H. 372.

⁶ *Waterford*, 1870, 2 O'M. & H. 24.

771. In *Cambridge*,¹ 74 messengers were employed on the one side and 34 on the other in connection with the election; and while there was a dispute about the necessity of so many being employed, there was none as to the fact of their employment, and the petition failed. But in *Oxford*,² where 198 messengers were employed on one side and 28 on the other, and 152 of the 198 were voters and performed no real services as messengers the election was voided. In *Penryn*,³ a voter having applied for employment to a candidate's election agent was sent to a person who gave him employment for a month, a fortnight before and a fortnight after the election. No inquiry was made as to how he was to vote until after he had been told where he was to go to get work, when in answer to an inquiry he stated he was to vote for the respondent and he did so vote. It was held that there was not colourable employment. In *Londonderry*,⁴ the employment of persons all of whom had promised the employer their support and votes long before the election was held not to be bribery. In *Rochester*,⁵ the Court indicated that the employment of 300 persons of the lower class of voters, who were paid ostensibly for registration purposes and worked with canvassing books was colourable, and would have been held to be bribery if it had been included in the petition. In *Plymouth*,⁶ payment of a substitute to do a voter's work in his absence was held to be bribery. In *Lancaster*,⁷ a general offer of work in his mills made by a candidate at a meeting of electors was held in the circumstances not to be bribery.

772. Permission by an employer to voters to absent themselves for a reasonable time to vote without deduction from their wages or salaries is now regulated by statute.⁸ It must be given equally to all persons alike so far as practicable without injury to the employer's business, and it is not to be given with a view to inducing a person to vote for any particular candidate or refused to prevent a person voting for a particular candidate. Although payment of travelling expenses is now an illegal practice, it may still become bribery. It has been held that a letter sent to a voter offering his travelling expenses to induce him to vote for a given candidate is bribery and that the law has not been altered in that respect.⁹ The distinction is illustrated by contrasting the *Bolton*¹⁰ case, where an invitation to a voter in these terms: "We enclose you a railway pass . . . I trust you will be able to make it convenient to come over and record your vote in favour of Messrs Cross and Knowles," was held not to be a conditional promise and, accordingly, not bribery, with the *Horsham*¹¹ case, where a request to the voter in these terms: "We should be glad to hear if you will give your support to Mr Hurst, in which case we shall be glad to pay your travelling

¹ 1857, 1 W. & D. 30.

³ 1869, 1 O'M. & H. 127.

⁵ 1892, Day's El. Cas. 102; 4 O'M. & H. 83.

⁶ 1880, 3 O'M. & H. 107, at p. 109.

⁸ 48 & 49 Vict. c. 56, s. 1.

¹⁰ 1874, 2 O'M. & H. 110.

² 1880, 3 O'M. & H. 155.

⁴ 1869, 1 O'M. & H. 274 at p. 277.

⁷ 1896, 5 O'M. & H. 39.

⁹ *Ipswich*, 1886, 4 O'M. & H. 70.

¹¹ 1876, 3 O'M. & H. 52.

expenses," was held to be a promise to pay his expenses if he voted for Mr Hurst and, therefore, bribery. In the *Pontefract*¹ case an agent of the respondent had written to two out-voters to come and vote for the respondent; one of them who accepted received 5s. before he voted, which was more than sufficient to pay his railway fare, and 5s. after he had voted; this was held to be bribery and to void the election.

773. A distinction is drawn in the statute between bribery committed before and after the voter has voted. After the voter has voted the act must have been done "corruptly." The word "corruptly," as so used, has been interpreted to mean that "if a man gave money to a voter as a reward for having voted for him, that being the moving cause of the vote, it must be a corrupt payment within the meaning of the Act,"² and also as meaning "an act done by a man knowing that he is doing what is wrong and doing it with an evil intent."³ In the *Stroud*⁴ case Bramwell B. said: "Now it would be impossible to find that it was corruptly done unless there had been some previous engagement or something else to make that wrong which otherwise would be right. I rather think the word 'corruptly' would not apply to any case where the payment was merely on account of the voting, unless there was some reason for giving the money,"⁴ and after giving as an example a payment made in charity to a man losing his job through having voted, he added: "Nevertheless in almost every case where a payment is made in consequence of a voter having voted, it would be a corrupt giving unless some reason, such as I have suggested, could be given." And in the *Cheltenham*⁵ case, the Court while declining to accept the contention that there could be no bribery in the absence of proof of an antecedent promise, agreed that the use of the word "corruptly" in the section of the Act made it important to see whether there was any antecedent promise or not, and in the particular case held that the payee had not acted corruptly.

774. Case 3 deals with bribery committed in direct or indirect transaction in the purchase of votes. Three Liberal candidates having come forward for one vacancy, in order to avoid endangering the seat a test ballot was taken to choose one of the three to be the adopted candidate. The successful candidate at the test ballot was elected member, but his election was voided under this section in consequence of his agents having given money to voters to vote for him at the test ballot without, however, making any stipulation as to their votes at the election or the voters understanding or supposing that these votes were being bargained for.⁶ And a payment to induce a man to personate his father who was dead, and to vote, was held to be bribery.⁷

¹ 1893, 4 O'M. & H. 200.

² *Cooper v. Slade*, 1857, 6 H.L.C. 746, per Lord Wensleydale at p. 790.

³ *Bradford*, 1869, 1 O'M. & H. 35, per Martin B. at p. 37.

⁴ 1874, 3 O'M. & H. 7, at p. 11.

⁵ 1869, 1 O'M. & H. 62.

⁶ *Bristol Election Petition*; *Brett v. Robertson*, 1870, L.R. 5 C.P. 503.

⁷ *Lisburn*, 1863, W. & B. 225.

775. Case 4 relates to a practice, formerly very common, of a candidate agreeing to pay a definite sum of money to a person after the election on a tacit understanding that he was to have his active assistance and support.¹ It does not strike at an arrangement between two persons becoming joint candidates on the footing that one of them should defray the whole election expenses incurred, although such an arrangement may constitute a case for inquiry.²

776. Case 5 deals with general bribery. It applies to any person, a candidate or other contributor (1) paying money with the intent that it should be expended, or (2) repaying money or discharging an obligation to pay money with the knowledge that it has been expended in bribery. Neither case has reference to individual voters. The bribery must take place at an election. In both cases the corrupt intention must exist, which will be shewn in the first instance by evidence of the circumstances under which the payment was made, and in the second by proof of the knowledge of the party making payment. General bribery has been defined thus: "A man giving a vote for a member of Parliament under what the law deems under influence gives no vote at all. This is the common law: it depends upon no statute, and it is a consequence of it, that if the judge is satisfied that the votes of a considerable number of persons were corrupted and bribed, however innocent the candidate may be, and though himself unconnected with corrupt practices, his election is void by reason of the incapacity of the voters, because of general corruption, to give valid and effective votes."³

777. Case 6 makes the acceptance of any money or valuable consideration or any office, place, or appointment by the recipient before or during an election, bribery on the part of the recipient equally with the giver as in Cases 1 and 2.

778. Case 7 makes the acceptance of any money or valuable consideration after an election bribery. To be corrupt the payment must be in implement of a previous agreement. The subsection does not include the procuring any office, place, or employment. Wagering, although an illegal contract which cannot be enforced, is nowhere made an offence which voids an election. An innocent bet made between two persons of opposite political views would not affect the vote of either of them.⁴ Where, however, a bet is made for the purpose of inducing a voter to vote for a particular candidate, and he does so, on a scrutiny the vote will be disallowed.⁵

SUBSECTION (2).—*Treating.*

779. Any person who corruptly by himself or by any other person either before, during, or after an election, directly or indirectly, gives

¹ *Barnstaple*, 1855, 2 Pow. R. & D. 336.

² *Coventry*, 1869, 1 O'M. & H. 97.

³ *Beverley*, 1869, 1 O'M. & H. 143, per Martin B. at p. 147.

⁴ *Monmouth*, 1835, K. & O. 416: *Youghal*, 1838, F. & F. 404.

⁵ *New Windsor*, 1835, K. & O. 195.

or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment, or provision to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election, shall be guilty of treating. And every elector who corruptly accepts or takes any such meat, drink, entertainment, or provision shall also be guilty of treating.¹ The governing word of the definition "corruptly," means "with the object and intention of doing that thing which the statute intended to forbid."²

780. Treating, to be corrupt, must be treating under circumstances and in a manner which shew that the person who treated used meat or drink with a corrupt mind—that is, with a view to induce people by the pampering of their appetite to vote or abstain from voting, and in so doing to act otherwise than they would have done without the inducement of meat or drink. It is not the law that eating or drinking are to cease at an election. "The statute does not apply to that form of treating which exists occasionally between social equals, when first the one treats, and then the other treats, and which is only one form of ordinary hospitality. Neither does it apply to certain kinds of treating which exist in relation to business matters; it is not at all uncommon for persons, when they have struck a bargain, to cement it with a little drink, and it is obvious that the treating referred to in s. 1 of the Act has no reference to treating of that sort. It applies, in my judgment, to that sort of treating which exists where the superior treats his inferior, the treating which gives the treater influence over the person treated, and secures for the former the goodwill of the latter. Not, however, to all cases of this kind does the corrupt treating spoken of in the Act apply; it does not apply where the treating is in return for small services, as where a man may treat a railway guard or porter, or he may treat his own servants; nor does it apply where the object is to acquire general goodwill. It must have reference to some election, and it must be for the purpose of influencing the vote of the person treated. What the object is in each particular case must depend upon the circumstances of the case."³ The giving of drink by brewers to encourage business has been held not to be treating,⁴ but keeping open public-houses with free drink supplied to all,⁵ and where a committee-room was located in a public-house, and all the persons who went through the form of enrolling as committee-men were given free drinks were held corrupt treating.⁶ One glass of beer may not justify the

¹ 46 & 47 Vict. c. 51, s. 1.

² *North Norfolk*, 1869, 1 O'M. & H. 242, per Blackburn J.

³ *Norwich*, 1886, 4 O'M. & H. 84, per Cave J. at p. 91.

⁴ *Rochester*, 1892, Day's El. Cas. 102; *Montgomery*, 1892, 4 O'M. & H. 168; Day's El. Cas. 150.

⁵ *Bewdley*, 1869, 1 O'M. & H. 16.

⁶ *Bradford*, 1869, 1 O'M. & H. 30; *North Louth*, 1911, 6 O'M. & H. 104, at p. 150.

inference of a corrupt motive,¹ but a large number of single incidents will make, taken together, a strong case, and a corrupt intention be inferred therefrom.² Treating need not be direct. Refreshments strictly limited to *bona fide* committee-men actually engaged in the work of the election were held not to be treating.³ But refreshments given on the polling day to over four hundred persons called "workers" actively assisting at the election, of whom about half were voters, were so regarded.⁴ Treating a non-electoral in order that he may influence a voter⁵ and giving drink to women that they may influence the votes of their fathers, brothers, or sweethearts have been held corrupt treating.⁶

781. Questions of treating arising in connection with contributions to charities or entertainments promoted either directly or indirectly by or on behalf of a candidate or by political or other associations are more difficult, and are determined by considerations not dissimilar to those regarding bribery, with this distinction that in bribery a corrupt contract usually exists between the voter and the candidate for the purchase of a vote, but not so in treating. In every case where refreshments are supplied at an entertainment given, or the expense of which is paid or contributed to by a candidate, the question is whether it was done with the corrupt intention of influencing votes in his favour. In ascertaining the question of fact, consideration will be given to the character of the entertainment, and whether the refreshments supplied were subsidiary to or were the real object of the meeting, and whether or not they were unduly lavish.⁷

782. In *Aylesbury*⁸ the respondent, having been defeated in July, and expecting to stand again at the general election in November, according to his usual custom in August gave a school treat in his park to 10,000 persons, invited irrespective of party, and provided refreshments. It was held that while there was a case for inquiry, a corrupt intention in the mind of the respondent to secure votes had not been proved. But in *Hexham*,⁹ sports usually held on Easter Monday having been postponed, the respondent's election agent arranged for them being held on Whit Monday. Admission was by ticket, the candidate was present and presided, when political addresses were given. The refreshments supplied cost £30 in excess of the admission money receipts, and this sum was paid by the election agent. The election was held void. In *Great Yarmouth*,¹⁰ the candidate, assisted by his wife and daughters, in October 1905 gave, entirely at his own expense, an At Home in the town hall to bid farewell to the retiring member. Non-intoxicant refreshments were arranged to be provided, but on the eve of the entertainment the caterer having without orders supplied liquor, its

¹ *Westbury*, 1869, 1 O'M. & H. 47.

² *North Louth*, 1911, 6 O'M. & H. 104.

³ *Bradford*, 1869, 1 O'M. & H. 33.

⁴ *Barrow-in-Furness*, 1886, 4 O'M. & H. 76.

⁵ *Longford*, 1870, 2 O'M. & H. 6, at p. 15.

⁶ *Tamworth*, 1869, 1 O'M. & H. 77, at p. 86.

⁷ *Great Yarmouth*, 1906, 5 O'M. & H. 176, at p. 195.

⁸ 1886, 4 O'M. & H. 59, at p. 62.

⁹ 1892, 4 O'M. & H. 143, at p. 146.

¹⁰ 1906, 5 O'M. & H. 176.

use was authorised by the candidate, and two dozen bottles of whisky and brandy were consumed. The election took place in January 1906. The Court, while considering the entertainment a very risky thing and very near the border-line, held that a corrupt intention was not proved. On the other hand, in *Bodmin*,¹ a garden party arranged by a person who had been the candidate's election agent, but had resigned, was given in September 1905, nominally under the auspices of the Liberal Social Council, but in fact by the candidate's parents. Invitations were issued, not exclusively to one party, over four thousand persons attended, tea and various entertainments were provided, a political meeting addressed by the candidate, his father and others was held, and the expenses of the entertainment, amounting to £170, were defrayed by the father. The election was voided.

783. Entertainments given by political associations will be readily inferred to impute corrupt treating to a candidate who has in any way contributed to the cost thereof.² In *Rochester*, at a *conversazione* given by a political association, refreshments were obtained by persons on producing a ticket costing threepence, to an extent greatly in excess of the sum paid, and the whole of the expense of the entertainment having been paid by the candidate the election was voided. Smoking concerts promoted by political associations at which the candidate, either when present provides free drinks, or contributes to the cost of providing refreshments thereat, are regarded as dangerous, and should not be encouraged.³ The guiding rule for candidates to adopt in all such cases has been stated thus: "Every candidate who wishes honestly to prevent the commission of corrupt and illegal practices will, from the moment he becomes a candidate, make up his mind that he will have nothing to do with any political club or association which makes it part of its business to provide meat, drink, and entertainment for the persons who are interested in the cause."⁴

784. Treating before and after as well as during an election may be corrupt. In *Windsor* ⁵ a candidate, three weeks before the actual canvassing in prospect of an election commenced, presided at a non-political dinner attended by persons of all shades of politics, some of whom were voters, and according to a custom, along with two other persons provided champagne, sherry, and cigars at a cost of £27, 10s. The Court viewed this as an objectionable transaction, by which a candidate might seek to ingratiate himself by a profuse expenditure on luxuries, but did not void the election. In *Kidderminster* ⁶ a successful candidate, who on the eve of the election had publicly stated that when the election was over, and "when free and untrammelled by the election law they would have a day's enjoyment together," in implement of his promise

¹ 1906, 5 O'M. & H. 225.

² *Rochester*, 1892, 4 O'M. & H. 156, at p. 159.

³ *Lancaster*, 1896, 5 O'M. & H. 39.

⁴ *Rochester*, 1892, Day's El. Cas. 101, per Vaughan Williams J. at p. 105.

⁵ 1874, 2 O'M. & H. 88, at p. 91.

⁶ 1874, 2 O'M. & H. 170.

handed his election agent £1000 towards the expense of an entertainment which he proceeded to organise. Notwithstanding that the proposal was abandoned after £300 had been spent, and the balance returned, the election was voided. But in *Salford*¹ an entertainment which had not been previously promised, and which was countermanded, but not before some expense had been incurred, did not void the election. And in *Brecon*² an entertainment given by the successful candidate's mother after the election was held not to void the election, although the transaction might be construed as corrupt with reference to a subsequent election.

SUBSECTION (3).—*Undue Influence.*

(i) *Definition.*

785. Every person is guilty of undue influence who, directly or indirectly, by himself or any other person on his behalf, makes use of or threatens to make use of any force, violence, or restraint, or inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to influence or compel such person to vote or refrain from voting at any election, or who by abduction, duress, or any fraudulent device or contrivance impedes or prevents the free exercise of the franchise of any elector, or thereby compels, induces, or prevails upon any elector either to give or refrain from giving his vote at any election.³ It is the unduly influencing individual voters that is made illegal. "The law cannot strike at the existence of influence. The law can no more take away from a man who has property, or who can give employment, the insensible but powerful influence he has over those whom, if he has a heart, he can benefit by the proper use of his wealth, than the law could take away his honesty, his good feelings, his courage, his good looks, or any other qualities which give a man influence over his fellows. It is the abuse of influence with which alone the law can deal. Influence cannot be said to be abused because it exists and operates."⁴

786. "The section deals with two classes of misconduct; the first consisting of using or threatening to use force, etc., or inflicting or threatening to inflict injury, etc., in order (that is to say, with the intent) to induce an elector to vote or refrain from voting; the second consisting of the successfully impeding or preventing the free use of the franchise of any elector by abduction, duress, or any fraudulent device or contrivance; and as regards the latter class of misconduct there must be proof that some elector or electors had been actually impeded or prevented before it can be held that an offence has been committed."⁵

¹ 1869, 1 O'M. & H. 141.

² 1871, 2 O'M. & H. 43.

³ 46 & 47 Vict. c. 51, s. 2.

⁴ *Lichfield*, 1869, 1 O'M. & H. 24, per Willes J. at p. 28.

⁵ *Stepney*, 1886, 4 O'M. & H. 34, per Denman J. at p. 57.

(ii) *Force or Threats of Force.*

787. Under the first class of offences the infliction of, or the threat to inflict "force, violence, or restraint" is comparatively infrequent. In *East Kerry*¹ an agent organised a band of some thirty young men partially armed with sticks, who patrolled the road leading to the polling station on the election day, obstructing the access of voters to the poll, and stating that if a voter was not going to vote for the right man he would not be accountable for his life. This not only voided the election, but the Court also held that the intimidation had been done with the knowledge and consent of the respondent, who during the greater part of the time had been in the immediate neighbourhood. But in *North Meath*² a respondent was absolved from a charge of undue influence through physical violence used by two priests in consequence of his having interfered in the interests of peace. And in *East Dorset*,³ where the agent of one of the respondents' estates was at a polling booth throughout the whole day, making entries in a notebook, which he subsequently destroyed, the Court, while disapproving of the agent's conduct, refused to void the election, holding it not proved that he did anything actively to intimidate or to deter persons from voting, or to threaten them if they did not do as he wished. In *North Louth*,⁴ when an agent of the respondent on the polling day told the sister of a voter to keep her brother at home, and remarked upon what would happen if she did not, and another agent canvassed a doubtful voter in the presence of a hostile crowd, the Court held intimidation proved in both cases. In *Longford*,⁵ where a respondent's party had organised a defensive force to protect outlying voters from being intimidated by a body of men introduced from other districts by the unsuccessful candidate, the Court, while disapproving of the practice, refused to void the election.

(iii) *Temporal Injury.*

788. The infliction of or the threat to inflict any temporal or spiritual injury, damage, harm, or loss upon an elector is more difficult. As already indicated, the law does not strike at legitimate influence. A landlord has a perfect right to choose his tenant and to turn him out, but if the landlord threatens to inflict or does inflict that turning out for his vote, that is inflicting harm or loss within the meaning of the Act.⁶ When tenants vote for a candidate at his request an election will not be voided merely on account of the fact that they were in arrears with their rent when they did so. The threat must be one which is in force and continuing down to the time of the election. So in *Windsor*⁷ the respondent after the election in 1868 had evicted a number of his

¹ 1910, 6 O.M. & H. 66.² 1892, Day's El. Cas. 114; 4 O.M. & H. 190.³ 1910, 6 O.M. & H. 35.⁴ 1911, 6 O.M. & H. 103.⁵ 1870, 2 O.M. & H. 78.⁶ *North Norfolk*, 1869, 1 O.M. & H. 236, per Blackburn J. at p. 241.⁷ 1874, 2 O.M. & H. 91.

tenants because they had voted against him, but as it was not proved that this conduct did as a fact influence any elector at the election of 1874, and no threats were used at that election, the Court refused to avoid the election in respect that the previous threats were no longer "operative."

789. Questions frequently arise out of the relation of employer and employee. In the *Westbury* case,¹ where it was proved that a manufacturer had exercised coercion on a large scale in order to force his workpeople to vote, it was held properly that it was an infliction of damage or loss which, being proved to be done by an agent, vacated the seat. In the *Blackburn*² and *Oldham*³ cases it was rightly held that though the loss and harm to be done to a man is not an illegal harm—not a matter that would be a crime like maltreating a man or destroying his property—yet if it be a loss inflicted for the purpose of affecting the vote, it is brought within the statute. "Another question arises as to the dismissal of workmen by their masters immediately before a parliamentary election, and that is: Where a master has a mixed motive for dismissing his man, when he has a reason for getting rid of him apart from his politics, is the employer bound, in point of law, to abstain from getting rid of him merely because of the general election coming on? Well, I think that in point of law, as an abstract question, he is not bound to abstain. But I think any sensible man or sound lawyer advising him would say: 'You may do so, but take care how you do so, because unless you prove clearly that you have a good ground for discharging your servant apart from the political one, it is inevitable that your discharge of him will be imputed to your dislike, not of the man himself, but of his politics.'"⁴ In the particular case under review, on the evidence as to the actual discharge and the threats of discharge to workmen before the election, the election was voided. It has been held to be intimidation to threaten a clergyman to give up a pew in his chapel if he did not vote as requested.⁵

790. What is termed "precarious" loss arises from the withdrawal or threat by a customer to withdraw his custom from a tradesman on account of his political opinions. A man may deal with a tradesman because of his political views, irrespective of the character of his goods, and he may change his custom as often as he pleases, but to withdraw or to threaten to withdraw custom from a tradesman because of his voting or not voting in a particular way is using undue influence.⁶

(iv) *Spiritual Injury.*

791. Spiritual injury is a vexed question. A clergyman, of whatever persuasion, whether the parish minister or a Roman Catholic priest, or the minister of any other denomination, is entitled to exercise

¹ 1869, 1 O'M. & H. 47.

² 1869, 1 O'M. & H. 198.

³ 1869, 1 O'M. & H. 156.

⁴ *Blackburn*, 1869, 1 O'M. & H. 204, per Willes J.

⁵ *Northallerton*, 1869, 1 O'M. & H. 168.

⁶ *North Norfolk*, 1869, 1 O'M. & H. 241.

the fullest rights of citizenship but no more. He is entitled to attend meetings for the selection of a candidate and in his support. He may also disseminate his political views and canvass for votes on behalf of anyone he chooses. But he must not in dealing with any member of his own congregation, or with any elector, use the influence which his position confers upon him "with such an engine to work upon the passions, to excite superstitions, fears, or pious hopes, to inspire as the object may be best promoted, despair or confidence, to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness, that good or evil, which is never to end."¹ In *Longford*,² after pointing out the great influence a priest exercises, Mr Justice Fitzgerald said: "In the proper exercise of that influence on electors the priest may counsel, advise, recommend, and entreat, and point out the true line of moral duty and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale, but he may not appeal to the fears, or terrors, or superstitions of those whom he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury, or disadvantage, or punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the Sacraments or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence."

(v) *Abduction.*

792. The second class of offence in the section is impeding the due exercise of the franchise in a variety of ways. One of the most obvious is abduction, *i.e.* the removal or detention of a voter to impede or deter him from voting. In *Lichfield*³ two voters were kept out of the way by the fraudulent devices of an agent of the candidate until it was too late for them to vote, and this was held to be an offence under this section. Forcible abduction is rare in modern times.

(vi) *Fraudulent Devices.*

793. In *Gloucester*,⁴ a replica of the ballot paper was issued by the candidate's committee with a mark opposite his name, and with a statement added that if any voter marked his ballot otherwise than indicated his vote would be invalidated. The Court refused to give effect to the contention that this was a fraudulent attempt to catch votes, holding that the committee had no intention to mislead when issuing the cards, although some voters might in fact have been misled.

¹ *Dublin*, 1869, 1 O'M. & H. 273.

³ 1869, 1 O'M. & H. 24.

² 1870, 1 O'M. & H. 15.

⁴ 1875, 2 O'M. & H. 60.

In *Down*,¹ where an agent advertised that he had discovered a device enabling him to avoid the secrecy of the Ballot Act, and that the ballot was a "sham," and had circulated amongst the electors 10,000 copies of a newspaper containing a descriptive article describing how a voter voted, the Court differed as to whether there had been an offence committed. In *Stepney*,² a card was issued reproducing the ballot paper with a diagram shewing the candidate's name with a cross opposite and a note, "Be careful not to sign your voting paper, nor make any other mark except the cross as shewn above, or your vote will be lost." The Court, while regarding the issue of the card as discreditable, refused to find the offence proved in the absence of proof that any one or more voters had been prevented or impeded in the free exercise of the franchise by the perusal of the cards, and held that the mere sending of them with the intent that they should have that effect did not amount to the offence of undue influence under the section. If a voter who has paired is proved to have voted in disregard of his pair, he will be guilty of a fraudulent device under this section.³

(vii) *General Intimidation.*

794. General intimidation at common law will avoid an election although not proved to have been caused by any act of the successful candidate or his agents, whenever it has so extensively prevailed as to prevent the election being a free election. It may be caused either by physical violence or by spiritual interference.

795. The rules to be applied in determining whether an election should be avoided on the ground of physical violence were laid down by Baron Bramwell in *North Durham*,⁴ which has since been regarded as the leading case, and are stated thus: General intimidation "applies to a case where the intimidation is of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency. If the intimidation was local or partial, for instance, if in this case it had been limited to one district, as Helton is, I have no doubt that in that case it would have been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by that intimidation, and that the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the respondent. But where it is of such a general character that the result may have been affected, in my judgment it is no part of the duty of a judge to enter into a kind of scrutiny to see whether possibly, or probably even, as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different. What the judge has to do in that case is to say

¹ 1880, 3 O'M. & H. 122.

³ *Northallerton*, 1869, 1 O'M. & H. 169.

² 1886, 4 O'M. & H. 55.

⁴ 1874, 2 O'M. & H. 156.

that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shewn that the gross amount of intimidation could not possibly have affected the result of the election it ought to be declared void."

796. A distinction is drawn where the general intimidation is limited to a part as distinguished from the whole constituency. This is explained in *Thornbury*,¹ where after narrating the character of the intimidation and its limited extent, and accepting the *North Durham*² and *Drogheda*³ cases as the leading authorities, Mr. Justice Field said, "Now in this constituency, out of twenty-three polling districts only three are affected by this crime, and out of 11,333, the total number of electors, 9529 went to the poll. The number of voters in the three districts in question is 789, and all but 87 voted. It is therefore difficult to come to the conclusion that any such intimidation or violence was used as practically prevented any considerable number of persons from voting. Again, we must consider not whether any particular person or particularly nervous person was affected by it. We must take the electors as an average of ordinary men who may be disinclined to go to the poll, but who were not necessarily intimidated. A man of ordinary courage would not necessarily be intimidated by what has happened. It seems to me that the question which I have to decide is whether all the electors of the other divisions of the constituency are to be disfranchised for what was done in the three divisions, and a fresh election held with all its turmoil and excitement. That will have to be done if I am satisfied that there has not been that free exercise of the franchise which everybody is entitled to have, and that the absence of that has been caused by intimidation and riot, but after the most careful consideration I am unable to come to the conclusion that this case falls within the principle of the *Durham* case."

SUBSECTION (4).—*Personation.*

797. Any person is deemed to be guilty of the offence of personation who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted at any such election applies at the same election for a ballot paper in his own name.⁴ To aid, abet, counsel, and procure the commission of personation is equally an offence. A corrupt intention is essential to the offence.⁵ Voting or attempting to vote a second time in the mistaken but honest belief that a person was entitled to do so would not be personation.⁶ A person put on the register in error in a name other than his own, having applied at an election for a

¹ 1886, 16 Q.B.D. 739; 4 O'M. & H. 65. ² 2 O'M. & H. 156. ³ 1874, 2 O'M. & H. 201.

⁴ 1869, 1 O'M. & H. 257.

⁵ *Athlone*, 1880, 3 O'M. & H. 57.

⁶ *Stepney*, 1886, 4 O'M. & H. 45; *Anstruther v. Williamson* (*St. Andrews* case), 1886, 13 R. 577.

ballot paper in the name appearing on the voters' roll, was held not guilty of personation, in respect of his not having applied for a ballot paper in the name of some other person or of a fictitious person.¹

798. The candidate is responsible for the act of his agent done out-with his knowledge.² Apart from proof of agency, a candidate is not responsible for acts of personation, and an election cannot be avoided on the ground of general personation existing in a constituency.³

SUBSECTION (5).—*Knowingly making a False Declaration
respecting Election Expenses.*

799. This will void the election whether done by the candidate or by his election agent.⁴ Where the false declaration is made by the election agent it is immaterial that this was done outwith the knowledge of the candidate and that no misconduct is attributable to him; the Court have no jurisdiction to grant relief and the election must be avoided.⁵

SUBSECTION (6).—*Other Offences.*

800. It is an offence for a candidate to engage any person as a canvasser or agent for the management of the election knowing that such person has within seven years previous to such engagement been "found" or "reported" guilty of any corrupt practice.⁶ The offence is limited to the engagement of a canvasser or agent. The agent does not require to be for the whole election; it is enough if he is an agent for part of the election. The engagement does not require to be made personally by the candidate. The offence is committed if the engagement is made with his knowledge and consent.⁷

801. It is an offence for a candidate to incur or authorise to be incurred any expenses on account of holding public meetings or issuing advertisements, circulars, or publications for the purpose of promoting or procuring his election without the authority in writing of the election agent.⁸ This offence was created to prevent evasion of exceeding the maximum expense allowed to be incurred by a candidate in promoting his election. The position now is that it is an offence to incur the expenses described in the section unless they have been authorised by the election agent in writing.⁹

SECTION 4.—ILLEGAL PRACTICES.

SUBSECTION (1).—*Paying for Conveyance of Electors.*

802. It is illegal for a candidate or any agent of a candidate to pay or contract to pay for the conveyance of electors to or from the poll,

¹ *Rex v. Fox*, 1887, 16 Cas. C.C. 166.

³ *Belfast*, 1886, 4 O'M. & H. 108.

⁵ *Berwick-upon-Tweed*, 1923, 7 O'M. & H. 1.

⁸ 8 & 9 Geo. V. c. 64, s. 34.

⁹ *Rex v. Hartwood*, [1898] 2 K.B. 277, per Avory J. at p. 281.

² *Gloucester*, 1873, 2 O'M. & H. 64.

⁴ 46 & 47 Vict. c. 51, s. 33 (7).

⁶ 31 & 32 Vict. c. 125, s. 44.

⁷ *North Norfolk*, 1869, 1 O'M. & H. 229; *Galway*, 1874, 2 O'M. & H. 196.

whether for the hiring of horses or carriages or for railway fares or otherwise.¹ The only exception to the prohibition is in the case of electors resident in a county where the nature of the county is such that any electors residing therein are unable to reach their polling place without crossing the sea or a branch thereof, when means may be provided for conveying such electors by sea to their polling place, and the amount of payment may be in addition to the maximum amount of expenses allowed to a candidate by the Act.² It is only the expense of conveying the voters to the polling place that is excepted. There is no provision for a candidate making any payment in respect of the return journey of the elector after voting. The payment forbidden is one arising out of a contract on account of the conveyance of electors as distinguished from a contract for the employment of hackney carriages or of carriages and horses kept for hire forbidden under s. 14 of the Act. It makes a material difference which section the offence comes under, as if under s. 14 the election is only avoided if the offence is committed by the candidate, his election agent, or sub-agent.³

803. In *Lichfield*⁴ payments made for the stabling and baiting of the horses and the feeding and putting up of drivers of forty or fifty vehicles sent from a distance by private owners to convey voters to the poll were held to be a contravention of this section. And in *Hartlepool*⁵ Mr Justice Phillimore said that a man might lend his carriages and horses and coachmen, although a part of their wages would be attributable to the day of election, and might make provision for feeding the horses, or in the case of a motor car for petrol, and might bring them from a distance and might put his carriage in repair for the purpose and might pay for any damage done, and might pay tolls, but he must not do it with the money of the candidate, and one lender must not pay for another. In *Oxford*⁶ the question was raised but not decided as to payment of a premium for an accident policy to protect the candidate and his election agent against claims for damage arising out of motor cars used on the election day. In *Berwick-upon-Tweed*⁷ the hiring by an election agent of a car to take speakers to election meetings before the poll was held to come within the section. Payment of a railway fare by any person on behalf of a voter is an offence, but not a car fare, that being an everyday occurrence;⁸ and where a voter used a cab to drive to the poll, and did not pay for it, no offence was held to have been committed.⁹

SUBSECTION (2).—*Excess Payment to Elector for Advertisement.*

804. It is illegal for a candidate or any agent of a candidate to pay or contract to pay an elector (a) for the use of any premises for the

¹ 46 & 47 Vict. c. 51, s. 7 (1) (a).

² *Ibid.*, s. 48.

³ *Manchester*, 1892, 4 O'M. & H. 120; *East Cork*, 1911, 6 O'M. & H. 337.

⁴ 1895, 5 O'M. & H. 20.

⁵ 1910, 6 O'M. & H. 2.

⁶ 1924, 7 O'M. & H. 39.

⁷ 1923, 7 O'M. & H. 1.

⁸ *Maidstone*, 1895, 5 O'M. & H. 202.

⁹ *Lancaster*, 1896, 5 O'M. & H. 44.

exhibition of any address, or (b) on account of the exhibition of any address, bill, or notice.¹ The payment or contract, if made to or with an advertising agent in the ordinary course of business is excepted. The illegality is limited to a payment to or contract with an elector. Payments made for the services specified to non-voters are not illegal if not excessive.² The giving out of boards covered with placards for exhibition was held not to be illegal in the absence of proof of any contract for payment.³

SUBSECTION (3).—*Excess Payments for Committee-rooms.*

805. It is illegal for a candidate or any agent of a candidate to pay or contract to pay for any committee-rooms in excess of the number allowed in the First Schedule to the Act.⁴ The recipient of such a payment, knowing it to be an excess payment, is also guilty of an illegal practice. The numbers allowed under the Act have been stated above.⁵ A candidate may have as many committee-rooms as he chooses. The offence is in paying for committee-rooms in excess of the statutory number. A candidate may use a room in his own house, but the expense of lighting, heating, and cleaning rooms or premises lent gratuitously for committees is a charge which must be included in his election expenses.⁶ In *Berwick-upon-Tweed*,⁷ the expenses of a room used as a committee-room for three weeks before the election in premises occupied by a political association, dissolved for the period of the election, were held to fall to be paid and included in the election expenses.

SUBSECTION (4).—*Payments otherwise than through Election Agent or Sub-Agent.*

806. It is illegal to make any payment, advance, or deposit, whether by a candidate at an election, or any other person, before, during, or after an election, in respect of the expenses incurred on account of the election, except through the election agent in person or a sub-agent;⁸ as also is the provision by any person other than the candidate for any such expenses whether as gift, loan, advance, or deposit otherwise than by payment to the candidate or his election agent. It is provided that the section shall not apply to (a) a tender of security, or payment, by a returning officer, or (b) any sum disbursed by any person out of his own money for any small expenses legally incurred by himself, if such sum is not repaid to him. The object of the section is to secure the payment of all election expenses through the medium of the election agent, who is bound to make a return accounting for every penny spent. A "small" sum is not defined. In *Norwich*,⁹ a person who was not an election agent, having paid £19, 10s. out of his own pocket for the

¹ 46 & 47 Vict. c. 51, s. 7 (1) (d).

³ *Pontefract*, 1893, Day's El. Cas. 126.

⁵ See para. 715, *supra*.

⁷ 1923, 7 O'M. & H. 1.

² *Westminster*, 1869, 1 O'M. & H. 89.

⁴ 46 & 47 Vict. c. 51, s. 7 (1) (c).

⁶ *St. George's*, 1896, 5 O'M. & H. 114.

⁸ 46 & 47 Vict. c. 51, s. 28.

⁹ 1886, 4 O'M. & H. 89.

posting and distributing of placards in the interest of the candidate, the amount was held too large to come under the proviso. In *West Bromwich*,¹ an agent having received £9 from the election agent was held to have committed an offence by paying all the expenses in connection with his committee-room. In *Berwick-upon-Tweed* ² payments made by sub-agents whose appointment had not been intimated to the returning officer one clear day before the day of nomination were held not to be struck at. Payments made by persons other than agents in violation of the section were found proved in the cases undernoted.³

SUBSECTION (5).—*Slander of Candidate.*

807. It is an illegal practice for a candidate, or any agent of a candidate, to make or publish, before or during an election, any false statement of fact in relation to the personal character or conduct of a candidate for the purpose of affecting his return, unless the person making or publishing such statement can shew that he had reasonable grounds for believing and did believe the statement made by him to be true.⁴ There is a proviso ⁵ that a candidate will not be liable nor subject to any incapacity nor his election avoided for any such illegal practice committed by any agent other than his election agent or sub-agent, unless (a) he has authorised or consented to the committing of such illegal practice by any other agent; or (b) he has paid for the circulation of the false statement constituting the offence; or (c) the Election Court finds and reports that the election of such candidate was procured or materially assisted in consequence of such false statement by such other agent.

808. To constitute the offence there must be (1) a statement of fact as opposed to a statement of opinion. A statement containing the expression "Radical traitors" was held to be one of opinion, no direct allegation having been made against the complainer.⁶ Words which, in fact, referred to an incident in the life of a candidate which cast no discredit on him, but which conveyed to the reader, and were intended to convey, that the candidate had been guilty of things which were discreditable were held to be a contravention of the statute.⁷ (2) The statement of fact must be untrue. (3) The statement of fact must relate to the personal character and conduct of the candidate. (4) The statement must be made for the purpose of affecting the return of the candidate.⁸ What is necessary to make the statement actionable may be derived from a comparison of the case of *Monmouth*,⁹ where the election

¹ 1911, 6 O'M. & H. 283.

² 1923, 7 O'M. & H. 1.

³ *Hartlepool*, 1910, 6 O'M. & H. 13; *North Louth*, 1911, 6 O'M. & H. 151; *East Cork*, 1892, 4 O'M. & H. 163; *Oxford*, 1927, 7 O'M. & H. 1; *Berwick-upon-Tweed*, *supra*.

⁴ 58 & 59 Vict. c. 40, ss. 1, 2.

⁵ *Ibid.*, s. 4.

⁶ *Ellis v. National Union*, 1900 L.T.Jo. 493.

⁷ *Silver v. Benn*, 1896, 12 T.L.R. 199.

⁸ *Cockermouth*, 1901, 5 O'M. & H. 155, per Darling J. at p. 159.

⁹ 1901, 5 O'M. & H. 17.

was voided, with that of *Attercliffe*,¹ where the petition failed. The defence that the person had reasonable grounds for believing, and did believe, the statements to be true depends upon the circumstances of each case, and the onus of proof is upon the defendant.² In *St. George's*,³ the Court reported that the respondent's election was not procured or materially assisted by the publication of the false statements by an agent other than an election agent, and in *Monmouth* found that it was.

SUBSECTION (6).—*Payment of Expenses in Excess of Maximum.*

809. It is an illegal practice for the candidate or his election agent or sub-agent knowingly to pay or incur any expense whether before, during, or after an election on account or in respect of the management of such election in excess of the maximum specified in the First Schedule to the Act.⁴ The expenses which may be legally incurred have been already specified.⁵ The word "knowingly" was held in *Berwick-upon-Tweed*⁶ to mean: "Knowing at the time the payment is made or the expense is incurred that it is on account, or in respect, of the conduct or management of the election, and if, when the total of those expenses are added up that total is in excess of the maximum, then the agent or the candidate, as the case may be, has knowingly acted in contravention of the section." This interpretation was approved and adopted in *Oxford*.⁷

810. Questions have arisen regarding clerks and messengers being employed for other purposes. In *Lichfield*⁸ it was held that persons employed as clerks were not debarred from canvassing and did not contravene the statute unless they canvassed by direct direction of the sitting member or his election agent, and the view of Lord M'Laren in the *Elgin* case⁹ was concurred in. And in *Oxford*¹⁰ the employment of messengers delivering a special edition of a newspaper with the candidate's address was held not to be an illegal act, and so also in *Barrow-in-Furness*.¹¹

811. How far the expenses of political clubs should be included depends upon the extent of their use by the candidate.¹² In *Berwick-upon-Tweed*,¹³ Mr Justice Sankey held that the Coalition Liberal Association was in fact simply an organisation of the respondent financed almost exclusively at his expense, and that the salary paid to the secretary during the time the election was in progress and other moneys paid them were items of expenditure which fell to be included, and with regard to 7s. 6d. per week paid by the respondent for the use of a room in the Association's premises, said: "A committee-room is defined in the

¹ 1901, 5 O'M. & H. 174.

³ 1896, 5 O'M. & H. 103.

⁵ See para. 712 *et seq.*, *supra*.

⁷ 1924, 7 O'M. & H. 49.

⁸ 1895, 5 O'M. & H., per Pollock J. at pp. 28, 29.

⁹ *Elgin and Nairn*, 1895, 5 O'M. & H. 13, per Lord M'Laren at pp. 13, 14, 15.

¹⁰ 1924, 7 O'M. & H. 49.

¹² See paras. 760 and 805, *supra*.

² *Sunderland*, 1896, 5 O'M. & H. 53

⁴ 46 & 47 Vict. c. 51, s. 8.

⁶ 1923, 7 O'M & H. 1.

¹¹ 1886, 4 O'M. & H. 52.

¹³ 1923, 7 O'M. & H. 1.

negative by s. 64 of the Act.” Mr. Baron Pollock in the case of the *St. George’s Division of the Tower Hamlets*¹ made these remarks: “When an election is taking place there must be a committee-room somewhere, and that committee-room must be hired unless the candidate carries it on in his own house, and there must be the expenses of the rent, coals, gas, cleaning, and so forth; and but for this club-room they must have gone elsewhere; it was found more convenient to have this club-room, but the people who inhabited it were the people who were election expenses. The decision in this case is important because it is just one of those little things that, until the law is known, may prove a source of difficulty in the minds of persons who are not acquainted with the law, and it is as well that they should know in the future that unless they make a return of such expenses they are guilty of a breach of the Act of Parliament.” And in *Oxford*² where the respondent had used three committee-rooms of which he was given the use voluntarily and had not included the cost of them in his expenses, Mr. Justice Avory, after quoting from Mr. Justice Sankey’s judgment in *Berwick-upon-Tweed*, said: “Mr. Matthews commented upon the fact that it would be strange to have to return as election expenses a sum which in truth was not incurred for one or other of those committee-rooms which was placed at the disposal of Mr. Gray *gratis*. He argued that the Court must be satisfied that the candidate would have been obliged to provide the committee-room at some expense if he had not had the room which was placed at his disposal *gratis*. I am rather disposed to think, without deciding it, that that may be the true test; at any rate I accept it for the purpose of this case, but the fact that Mr. Gray used the room, and the way in which he used it are cogent evidence to shew that it was necessary for his purpose, and that if he had not had it he would have had to provide for it by hiring rooms,” and in the result he held that the cost must be included.

812. As to whether or not the expense of meetings held prior to the actual contest beginning and meetings held by political associations should be included, the test as already explained is whether in both cases the meetings were held with the legitimate object of furthering the principles of the political party they favoured or were meetings convened with the direct object of advancing the election of the candidate.³ In the latter case they would fall to be included.⁴ The use of rooms in elementary schools has been dealt with above.⁵

813. Moneys paid in improving the registration of the constituency and in publishing a newspaper are not election expenses.⁶ But payment of canvassers under the cloak of doing registration work would be an illegal practice, and any payment made would fall to be included in the candidate’s expenses.⁷ And in *Oxford*⁸ where the candidate had

¹ *St George’s*, 1895, 5 O.M. & H. 114, at p. 114.

³ See para. 760, *supra*.

⁵ Para. 721, *supra*.

⁷ *Rochester*, 1892, 12 Day’s El. Cas. 102.

² 1924, 7 O.M. & H. 49, at p. 76.

⁴ 8 & 9 Geo. V. c. 64, s. 25.

⁶ *Kennington*, 1886, 4 O.M. & H. 93.

⁸ 1924, 7 O.M. & H. 7.

contributed to a special edition of a newspaper a number of articles as his last word to the electors and had suggested and arranged with the editor for their publication, this was held to have been an illegal practice, and the expense of issue formed an item to be included in his expenses.

SUBSECTION (7).—*Candidate Voting or Procuring Illegal Vote.*

814. It is illegal for a candidate himself to vote or for him or his election agent or sub-agent to induce or procure another person to vote at an election knowing that he or such person is prohibited from voting.¹ Carelessness or want of trouble by an agent, to prevent a person voting not entitled to do so, although a failure of duty, does not constitute the offence.²

SUBSECTION (8).—*False Notice of Withdrawal.*

815. It is illegal for a candidate or his election agent or sub-agent knowingly to publish before or during an election a false statement of the withdrawal of a candidate at such election for the purpose of promoting or procuring the election of another candidate.³

SUBSECTION (9).—*Advertisements lacking Printer's Name and Address.*

816. It is illegal for a candidate or his election agent or sub-agent to print, publish, or post any bill, placard, or poster, which does not bear upon its face the name and address of the printer or publisher.⁴ The expression "bill" is not defined, but in *Barrow-in-Furness* ⁵ it was described as "a very large word indeed." In *Oxford* ⁶ a postcard was held not to be a bill, placard, or poster, and in *Cockermouth* ⁷ an election address printed on the back of a signed photograph of the candidate, which bore the stamp of the London Stereoscopic Company, but omitted the name of the printer or publisher, was held not to contravene the statute.

SUBSECTION (10).—*Payment of Expenses after Prescribed Date.*

817. It is illegal for an election agent or sub-agent, with the connivance or sanction of the candidate, to pay (a) any claim in respect of the election not sent in to him within 14 days after the declaration of the election; or (b) any election expense after 28 days after the declaration of the election without the judgment or leave of a competent Court.⁸ The debt may have been quite properly incurred; the offence is in disregarding the time limit within which the claim must either be made or paid. In *Berwick-upon-Tweed* ⁹ the Court found that

¹ 46 & 47 Vict. c. 51, s. 9 (1) (3).

² 46 & 47 Vict. c. 51, s. 9 (2) (3).

³ 1886, 4 O'M. & H. 76.

⁴ 1901, 5 O'M. & H. 156.

⁵ 1923, 7 O'M. & H. 1.

⁶ *Stepney*, 1892, 4 O'M. & H. 178.

⁷ *Ibid.*, s. 18 (2) (5).

⁸ 1924, 7 O'M. & H. 49.

⁹ 46 & 47 Vict. c. 51, s. 29 (2) (5).

payments had been made after the proper time, and in *Oxford*¹ that the payments had been made after the proper time and false dates of payment entered to conceal the offence.

SUBSECTION (11).—*Illegal Payments, Employment, or Hiring.*

818. Illegal payments, employment, or hiring are offences under the Corrupt Practices Act,² but are illegal practices only when committed personally by the candidate or his election agent or sub-agent.

(i) *Illegal Payments.*

819. It is an illegal practice knowingly to provide money for any payment contrary to the provisions of the Corrupt Practices Act, 1883, or for any expenses incurred in excess of any maximum allowed by said Act, or for replacing any money expended in any such payment or expenses, except when the same may have been previously allowed as an exception.³ This section has the same object in view as s. 8, to limit expenditure at elections, but has a wider scope. It forbids any one doing what the candidate and his election agent and sub-agents have already been prohibited from doing, and makes any such act on their part not merely an illegal payment but also an illegal practice. In *Berwick-upon-Tweed*⁴ a sub-agent paid an amount of £4 for the hire of cars for conveying voters to the poll on the polling day. This amount was returned in the candidate's election expenses account, but was held under this section to be an illegal payment by the sub-agent, who was reported for an illegal practice, and refused a certificate of indemnity.

(ii) *Illegal Employment.*

820. It is illegal to engage or employ for payment or promise of payment any person for any purpose or in any capacity whatever except for any purposes or capacities mentioned in the first or second parts of the First Schedule to the Corrupt Practices Act, or so far as payment is thereby authorised.⁵ Under s. 8 it is an illegal practice to exceed the maximum expenditure; the present section ensures that the Act may not be avoided by engaging persons ostensibly in one capacity and employing them in another by defining and classifying the number of persons who may be employed, and in what capacity. It makes it an illegal payment for anyone to pay a person employed otherwise than as classified, and so prevents colourable employment. The First Schedule and the cases having reference thereto have already been dealt with.⁶

¹ 1924, 7 O'M. & H. 49.

² 46 & 47 Vict. c. 51, s. 13.

³ 46 & 47 Vict. c. 51, s. 17.

⁴ Secs. 21, 27 (1).

⁵ 1923, 7 O'M. & H. 1.

⁶ See para. 713 *et seq.*, *supra*.

(iii) *Illegal Hiring.*

821. It is illegal for the purpose of the conveyance of electors to or from the poll (a) to let, lend, or employ any public stage, or hackney carriage, or any horse or other animal kept or used for the purpose of letting out for hire, knowing that it is intended to be used for the purpose of conveying electors to or from the poll; or (b) to hire, borrow, or use any carriage, horse, or other animal, knowing that the owner thereof is prohibited from letting, lending, or employing it for that purpose.¹ A proviso excepts a carriage, horse or other animal let to or hired, employed or used by any elector or several electors at their joint cost to convey them to or from the poll, and exempts from liability to pay any duty or to take out a licence for any carriage by reason only of such carriage being used as aforesaid without payment or promise of payment. The offence is the illegal letting, hiring, or borrowing of vehicles or horses for use in conveying electors to and from the poll in contradistinction to the offence under s. 7 of the Act of paying for conveying voters to vote.

822. It is illegal to hire or use as a committee-room for an election any premises (a) on which the sale of any intoxicating liquor is authorised by a licence; (b) where any intoxicating liquor is sold, or is supplied to members of a club, society, or association other than a permanent political club; (c) whereon refreshment of any kind, whether of food or drink, is ordinarily sold for consumption on the premises; or (d) of any public elementary school in receipt of an annual parliamentary grant or any part thereof.² There is a proviso that nothing in the section is to apply to any part of such premises which is ordinarily let for the purpose of chambers or offices, or the holding of public meetings or of arbitrations, if such part has a separate entrance and no direct communication with any part of the premises on which any intoxicating liquor or refreshment is sold or supplied as aforesaid. In *West Bromwich*,³ a room used as a committee-room was held sufficiently cut off from a refreshment shop by locking a door giving access to the shop, and restricting the entrance to it by a side passage leading from the street. And in *Cockermouth*⁴ a committee-room in part of licensed premises, which had no direct communication with the other part of the premises, was used usually for dances, choir practices, and religious meetings, and never for the sale or consumption of liquor, was held to come under the proviso.

823. Sec. 7 makes it an illegal practice to pay for any committee-rooms in excess of the maximum number allowed in the Schedule. The object of this section is to limit the premises used as committee-rooms whether these are paid for or lent to the candidate, and to make such use illegal hiring under the Act, and an illegal practice committed by the candidate or his election agent or sub-agent. The

¹ 46 & 47 Vict. c. 51, s. 14.

² 1911, 6 O'M. & H. 286.

³ *Ibid.*, s. 20.

⁴ 1901, 5 O'M. & H. 155.

premises of any public elementary school have been held to include a schoolmaster's house if within the curtilage.¹

SUBSECTION (12).—*Corrupt procuring of Withdrawal of Candidate.*

824. It is an offence corruptly to induce or procure any other person to withdraw from being a candidate at an election in consideration of any payment or promise of payment.²

SUBSECTION (13).—*Music, Flags, Favours, etc.*

825. It is illegal for a candidate or his election agent or sub-agent to pay or contract to pay before, during, or after an election an account for bands of music, torches, flags, banners, cockades, ribbons, or other marks of distinction.³ Any person or party to such contract on receiving such payment in the knowledge that it was illegal is also guilty of an offence.⁴ It is not because a ribbon is blue or any other colour, or because a cockade is more or less showy that it is objectionable; it is because it is a party badge.⁵ Broad strips of canvas with the words "Isaacson for Stepney!" printed on them were held to be banners and marks of distinction.⁶ A payment by a candidate to a voter for the loss of his hat at a meeting by damage done by a banner and returned in his account of election expenses was held not to be an offence under the section,⁶ nor a payment for bands playing before an election began.⁷ In *Walsall*,⁸ 2000 cards with the respondent's photograph and the words, "We're bound to Win!" "Play up, Swifts!" "Vote for James!" and 2000 plain cards in the respondent's colours, ordered by an independent party with the knowledge of the election agent of the use they were to be put to, and paid for and sanctioned by him in his account of expenses, were distributed as hatbands. This was held to be an illegal practice and to avoid the election, and relief was refused. But in *East Clare*⁹ cards issued inviting the recipients to vote, and proved to have been largely worn in the hats of the respondent's supporters, were held not to be marks of distinction, on the ground that the fact that a use was made of them other than that for which they were supplied did not render them illegal in the absence of some specific evidence from which the Court would infer that such illegal use was intended by those supplying them.

SUBSECTION (14).—*Payment of Fees in University Election.*

826. If any person, for the purpose of enabling any other person to vote at a University election, corruptly pays on his behalf any fees

¹ *Buckrose*, 1886, 4 O'M. & H. 113.

³ *Ibid.*, s. 16 (1).

⁵ *Walsall*, 1892, Day's El. Cas. 110.

⁷ *Hexham*, 1892, 4 O'M. & H. 143.

⁹ 1892, 4 O'M. & H. 163.

² 46 & 47 Vict. c. 51, s. 15.

⁴ *Ibid.*, s. 16 (2).

⁶ *Stepney*, 1892, 4 O'M. & H. 179.

⁸ 1892, 4 O'M. & H. 126.

which such other person is required to pay in order to be registered or entitled to vote, he shall be guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, and that Act shall accordingly apply.¹

SECTION 5.—PENALTIES FOR CORRUPT PRACTICES.

SUBSECTION (1).—*On Candidate found Guilty on Election Petition.*

827. If an Election Court reports that any corrupt practice other than treating or undue influence has been proved to have been committed at an election by or with the knowledge or consent of any candidate, or that treating or undue influence has been committed by any candidate—

- (1) the candidate is disabled for ever from being elected or sitting for the county or borough in reference to which the offence has been committed.
- (2) if the candidate has been elected, the election is void; and
- (3) the candidate is further subject to the same incapacities as if at the date of the report he had been convicted on an indictment of a corrupt practice.²

828. When an Election Court reports that a candidate has been guilty by his agents of any corrupt practice—

- (1) he is incapable of being elected for the county or borough in reference to which the offence has been committed for seven years after the date of the report; and
- (2) if he has been elected, the election is void.³

SUBSECTION (2).—*On any Person found Guilty of Corrupt Practice.*

829. A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation shall be guilty of an offence, and on conviction on indictment shall be

- (1) liable to be imprisoned with or without hard labour for a term not exceeding one year, or to be fined any sum not exceeding £200; ⁴ and
- (2) incapable during a period of seven years from the date of his conviction (a) of being registered as an elector or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any public office within the meaning of the Corrupt Practices Act, 1883; (b) of holding any public or judicial office, and if he holds any such office the office shall be vacated; ⁵ or (c) of being elected to and of sitting in the House of Commons, and if at that date he has

¹ 1918 Act, Schedule V., Pt. ii., s. 36.

² *Ibid.*, s. 5.

⁴ *Ibid.*, s. 6 (1).

² 46 & 47 Vict. c. 51, s. 4.

⁵ *Ibid.*, s. 6 (3).

been elected to the House of Commons his election shall be vacated from the time of such conviction.¹

830. A person who is summarily convicted of any corrupt practice shall be subject to the same incapacities as if he had been convicted on indictment, and is liable to imprisonment with or without hard labour for a term not exceeding six months, or to be fined any sum not exceeding £200.²

SUBSECTION (3).—*For Personation.*

831. A person who commits the offence of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation is guilty of felony, and on conviction shall be punished by imprisonment for a term not exceeding two years together with hard labour,³ and is subject to the same incapacities as if he had been convicted of a corrupt practice.⁴

SECTION 6.—PENALTIES FOR ILLEGAL PRACTICES.

SUBSECTION (1).—*By any Person.*

832. A person guilty of an illegal practice on summary conviction is (a) liable to a fine not exceeding £100;⁵ and (b) incapable during a period of five years from the date of his conviction of being registered as an elector, or of voting at an election (whether a parliamentary election or an election for a public office held for or within the county or borough in which the illegal practice was committed).

SUBSECTION (2).—*By a Candidate.*

833. If an Election Court reports that any illegal practice has been committed by or with the knowledge or consent of a candidate, the candidate (a) is incapable of being elected to or sitting in the House of Commons for the county or borough in respect of which the offence has been committed for seven years next after the date of the report; and (b) if he has been elected his election is void; and (c) is further subject to the same incapacity as if at the date of the report he had been convicted of such illegal practice.⁶ If the Court reports that a candidate has been guilty by his agents of any illegal practice in reference to his election, the candidate is incapable of being elected to or sitting in the House of Commons for the constituency during the Parliament for which the election was held, and if he has been elected his election is void.⁶

SUBSECTION (3).—*For Illegal Payment, Employment, or Hiring.*

834. A person guilty of an offence of illegal payment, employment, or hiring at an election is on summary conviction liable to a fine not

¹ 46 & 47 Vict. c. 51, s. 6 (4).

² *Ibid.*, s. 6 (3).

³ *Ibid.*, s. 6 (2).

⁴ *Ibid.*, ss. 3 and 6 (3).

⁵ *Ibid.*, s. 10.

⁶ *Ibid.*, s. 11.

exceeding £100.¹ A candidate or an election agent of a candidate who is personally guilty of an offence of illegal payment, employment, or hiring is guilty of an illegal practice, and is punished accordingly.²

SUBSECTION (4).—*Disqualification from Voting.*

835. Every person guilty of a corrupt or illegal practice or of illegal employment, payment, or hiring at an election is prohibited from voting at such election, and if any such person votes his vote is void.³

SUBSECTION (5).—*Fraud at University Election.*

836. Any person falsely or fraudulently signing any voting paper in the name of any other person, either as voter or witness, at a university election, and every person certifying or transmitting such false voting paper, knowing the same to be false, or fraudulently altering or obstructing any voting paper is guilty of a crime and offence and liable to a fine or imprisonment for a term not exceeding one year.⁴

PART V.—ELECTION PETITIONS.

SECTION 1.—PARLIAMENTARY ELECTION PETITION.

SUBSECTION (1).—*Introductory.*

837. All questions arising in a controverted election were determined formerly by a Select Committee of the House of Commons. This jurisdiction was transferred in Scotland to the Court of Session by the Parliamentary Elections Act, 1868,⁵ and no election or return to Parliament is now to be questioned except in accordance with the provisions of that Act. The House of Commons, however, may still declare any particular seat vacant, where they consider it necessary to do so, whether upon matters regarding which a petition would lie, or upon matters emerging after an election, as to which a petition would not be competent. They have so dealt in the case of an escaped convict,⁶ a member holding Government contracts,⁷ or a place of profit under the Crown,⁸ and in cases of contumacy,⁹ misconduct,¹⁰ and misdemeanour.¹¹ The Act of 1868, amended and extended by the Corrupt and Illegal Practices Prevention Act, 1883,¹² and the Rules of Procedure made thereunder¹³ now regulate and determine all Election Petition proceedings in Scotland.

SUBSECTION (2).—*Election Judges.*

838. The judges of the Court of Session, in each year, select from their number and appoint a rota of four judges to be election judges

¹ 46 & 47 Vict. c. 57, s. 21 (1).

² *Ibid.*, s. 21 (2).

³ *Ibid.*, s. 36.

⁴ 8 & 9 Geo. V., Schedule V., Pt. ii., cl. 32.

⁵ 31 & 32 Vict. c. 125.

⁶ *John Mitchell*, 1875, 130 Journ. 52.

⁷ *Sir S. Waterlow*, 1869, 124 Journ. 12.

⁸ *Sir Bryan O'Loughlan*, 1879, 134 Journ. 161.

⁹ *Mr. Bradlaugh*, 1880, 137 Journ. 62.

¹⁰ *Mr. Daly*, 1895, 150 Journ. 353.

¹¹ *Mr. A. A. Lynch*, 1903, 158 Journ. 40.

¹² 46 & 47 Vict. c. 51.

¹³ C.A.S., J. i.

for the trial and disposal of election petitions.¹ Every election petition must be presented to one of the Divisions of the Court of Session, who have exclusive jurisdiction to determine all questions of competency, relevancy, or amendment, and every application which goes to the root of the petition, and which if refused or sustained would absolutely and definitely terminate the cause and preclude any further procedure, and their decision is final. Two election judges must conduct the trial of every petition, which is not and does not require to be remitted to them from the Division, and their decision is final, except upon a question of law referred by them, or submitted in a stated case to either Division. All interlocutory matters must be submitted to the election judges selected to try the petition, or to the Lord Ordinary on the Bills in vacation, and their decision is final.²

SUBSECTION (3).—*Who may Petition.*

839. A petition may be by any person who (a) voted or had a right to vote at the election to which the petition relates; or (b) claims to have had a right to be returned or elected at such election; or (c) alleges himself to have been a candidate at such election.³

The onus is upon the respondent to shew that the petitioner is not qualified.⁴ A question was raised but not decided in *Walsall*⁴ as to the meaning of "voted or had a right to vote." It is thought that these words are limited to persons who had a right to vote, whether in fact they voted or not at the election. Any other construction would involve the anomaly of the petitioner being possibly a person guilty of bribery or some such offence, which prohibited him from voting, and rendered any vote given by him null and void. Anyone who though disqualified has been *de facto* nominated a candidate may petition.⁵ Where the petition is by electors more than one should be petitioners in case objection should be taken successfully to some of them. The status of the petitioners is material, as if "men of straw," it may ultimately affect the question of expenses.⁶

SUBSECTION (4).—*Time of Petitioning.*

840. A petition must be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery, unless it questions the return or election (1) upon an allegation of corrupt practices, and specifically alleges a payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of such return, in pursuance or in furtherance of such corrupt practice, in which case the petition may be presented

¹ 31 & 32 Vict. c. 125, s. 25.

² *Christie v. Grieve*, 1869, 7 M. 378 (*Greenock* case); *Irwin v. Mure*, 1874, 1 R. 834; 2 O'M. & H. 213 (*Renfrew* case); *Hood v. Gordon*, 1895, 23 R. 4; 5 O'M. & H. 2 (*Elgin and Nairn* case).

³ 31 & 32 Vict. c. 125, s. 5.

⁵ *Harford v. Linskey*, [1899] 1 Q.B. 34.

⁴ *Walsall*, 1892, 2 Day's El. Cas. 2.

⁶ *Stepney*, 1892, 4 O'M. & H. 178.

at any time within twenty-eight days after the date of such payment; ¹ or (2) upon the ground of an illegal practice, in which case the petition may be presented at any time before the expiration of fourteen days after the day on which the returning officer received the return and declarations respecting election expenses by the member to whose election the petition relates and his election agent; ¹ or (3) upon the ground of an illegal practice, and if the petition specifically alleges a payment of money or some other act to have been made or done, since the day on which the returning officer so received the return and declarations aforesaid, by the member or an agent of the member or with the privity of the member or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, in which case it may be presented at any time within twenty-eight days after the date of such payment or other act.²

841. Where the petition questions the return or the election upon the ground of an illegal practice, or where an application is made to amend an already pending petition to question the return upon the ground of an illegal practice, (a) where the return and declaration are received of different days, the day on which the last of them is received; and (b) where there is an authorised excuse for failing to make and transmit the return and declarations respecting election expenses the date of the allowance of the excuse, or if there was a failure as regards two or more of them, and the excuse was allowed at different times, the date of the allowance of the last excuse is to be substituted for the day on which the return and declarations are received by the returning officer.³

842. In reckoning time for the above periods, and for all purposes of procedure, Sunday, Christmas Day, Good Friday, and every day set apart for a public fast or public thanksgiving shall be excluded.⁴ The "return" of a member is not made until the writ with the certificate of the returning officer indorsed thereon reaches the hands of the Clerk of the Crown in Chancery so that he may act upon it. In *Poole*,⁵ where the writ duly indorsed was handed by the returning officer on the morning of 4th February to the Postmaster, Poole, dispatched by him at 12 noon, and delivered by the Postmaster-General the same evening between 8 and 9 p.m. at the office of the Clerk of the Crown in Chancery, Westminster, and received by the housekeeper, who delivered it to the Clerk of the Crown when his office opened on 5th February, it was held that the writ was delivered on that date, and that the days for the filing of a petition were to be reckoned from the 5th and not the 4th February.

SUBSECTION (5).—*Grounds of Petition.*

843. Any matters which if proved would void the election may be alleged as the grounds for petitioning. These include (a) the incapacity

¹ 31 & 32 Vict. c. 125, s. 6 (2).

² 46 & 47 Vict. c. 51, s. 40 (1).

³ *Ibid.*, s. 40 (2), (4).

⁴ 31 & 32 Vict. c. 125, s. 49.

⁵ *Hurdle v. Waring*, 1874, L.R. 9 C.P. 435.

of the successful candidate to be elected; (b) corrupt or illegal practices on the part of the elected candidate or his election agent; ¹ (c) improper admission or rejection of votes which upon a scrutiny would convert the majority into a minority; ² (d) miscount of the votes, which upon a recount would give the petitioner a majority; ³ (e) a double return or no return; (f) irregularities in the conduct of the election voiding the election; and (g) general bribery, treating, and undue influence.

SUBSECTION (6).—*Form of Petition.*

844. An election petition, as near as may be in the form of Schedule B annexed to the Rules, must set forth articulately in the form of a condescendence, according to the rules and practice of the Court of Session in ordinary proceedings, (1) the right of the petitioner within s. 5 of the Parliamentary Elections Petitions Act; (2) the proceedings at and the result of the election; (3) the facts relied on in support of the prayer of the petition; and shall conclude with a prayer (as, for instance) that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced as the case may be.⁴ The petition must be signed by the petitioner or all the petitioners if more than one.⁵

845. In *Greenock*,⁶ an application to dismiss the petition on the ground that the petitioner's averments in different articles that the election of the respondent was effected "by an extensive and elaborate organisation of undue influence and large expenditure," and that "bribery, treating, and undue influence were practised," and that "corrupt practices extensively prevailed" did not set forth with sufficient specification "the facts relied on in support of" its prayer was refused. Lord Justice-Clerk Patton said:⁷ "I hold that the second section only requires that the petition should be in the form of a condescendence. The statement is to be articulate; it must set forth articulately the facts on which the prayer is founded. We have here a statement of facts—not certainly a statement of each individual fact which is to be proved—which would seem to be very much a statement of the evidence of the general fact. What more specification and detail is wanted? Take a case of bribery or the general prevalence of corrupt practices. What would be sufficient specification? I do not know any specification other than such a statement as we have in this petition, unless we are to insist on every act of bribery or of corrupt practices being given in detail, because it would not do to specify a few instances and make a general allegation as to the others. We must come to this that either every individual act must be set out, or that it is sufficient to set out the general fact alleged. I do not think it necessary to set out such details." And

¹ 46 & 47 Vict. c. 51, s. 22.

³ Ballot Act, s. 2.

⁴ Rule 2.

⁶ *Christie v. Grieve*, 1869, 7 M. 378.

² 31 & 32 Vict. c. 125, s. 53.

⁵ 31 & 32 Vict. c. 125, s. 6 (1).

⁷ At p. 380.

Lord Cowan, one of the framers of the Rules, said: ¹ "The rule does not say that the petition is to contain a condescendence according to the rules and practice of the Court in ordinary procedure. The 'form' of a condescendence is to be adopted in setting forth the facts relied upon in support of the petition. That is all; and nothing more was intended or is prescribed than what is required in the English rules as to this matter. The sufficiency of the facts, or of the matter to be stated in that form relevant to support the petition, falls to be judged by a different criterion."

846. In *Beal v. Smith*,² an allegation that "the respondent by himself and other persons on his behalf was guilty of bribery, treating, and undue influence before, during, and after the election" was held sufficient. In *Pontefract*,³ it was suggested that an allegation generally of corrupt and illegal practices in the petition would be sufficient. In *Berwick-upon-Tweed*,⁴ a petition which alleged that the respondent had exceeded the maximum expenses allowed under s. 8 of the Corrupt Practices Act was allowed to be amended by adding the word "knowingly," on the ground that no new charge was being introduced, and Avory J. indicated that a perfectly good formula for making such a charge would be "That between certain dates the agent knowingly incurred expenses on account of, or in respect of, the conduct or management of the election to the amount of — pounds, which amount was in fact in excess of the maximum." And in *Lancaster*,⁵ Bruce J. said: "I should much prefer to see in a petition, instead of a general allegation of corrupt and illegal practices, separate paragraphs setting out the character of the offences charged against the respondent so that he might be informed from the first of the general character and nature of the charges preferred against him."

847. In a petition which asks for a scrutiny it is essential that there should be an averment that the person for whom the seat is claimed has a majority of legal votes.⁶ In *Renfrew*,⁷ where the petition asked that the voting papers be recounted so that the correct numbers might be ascertained, and that it should be determined that the respondent was not duly elected or returned, and that the petitioner was duly elected and should have been returned, averments that the enumerators had made mistakes in counting the votes, and that the mode of procedure was unsatisfactory in respect that the counting of the twelve different enumerators was in no way checked were held sufficient. It was held that the proper mode of objecting to the competency or relevancy of a petition was by a note to the Division of the Inner House to which the petition had been presented. In *West Bromwich*,⁸ where the petition called for a recount and scrutiny, an allegation that the

¹ At p. 381.

³ *Pontefract*, 1892, O'M. & H. 28.

⁴ 1923, 7 O'M. & H. 1.

⁶ *Trench v. Nolan*, 1872, L.R. 6 C.P. 464.

⁷ *Irwin v. Mure*, 1874, 1 R. 834.

² 1869, L.R. 4 C.P. 145.

⁵ 1896, 5 O'M. & H. 41.

⁸ 1911, 6 O'M. & H. 259.

petitioner claimed a majority of good and lawful votes was held to be insufficient.

SUBSECTION (7).—*Who may be Respondents.*

848. The respondent may be (1) the person whose election or return is complained of, and also (2) the returning officer, if his conduct of the election is complained of.¹ Two or more candidates may be made respondents to the same petition, and their case may for the sake of convenience be tried at the same time, but for all other purposes it is deemed to be a separate petition against each respondent.²

849. All the successful candidates need not be made respondents, even though the ground of the petition may affect the validity of the election as a whole.³ An unsuccessful candidate cannot be made a respondent against his will.⁴ But where a defeated candidate at a municipal election was *de facto* in office, and would neither resign nor disclaim the office, he was held properly to have been made a respondent.⁵ A petition may be presented against the return of a member after his death.⁶ If on a petition the respondent is unseated and the petitioner is declared duly elected, the decision of the Court is final, and a petition against the return of such candidate cannot subsequently be presented.⁷

850. If no allegation is made against the returning officer in the petition no evidence is allowed to be led to implicate him.⁸ It is not a relevant charge against a returning officer that he gave an erroneous opinion in law regarding the validity of a nomination paper or a ballot paper.⁹ There must be allegations imputing misconduct, negligence, or gross failure of duty by the returning officer.¹⁰ The returning officer is properly made a respondent if there is a relevant allegation of negligence on the part of his subordinates.¹¹

SUBSECTION (8).—*Presentation of Petition.*

851. The presentation of the petition is made by lodging it at the office in the New Register House, Edinburgh, of a Principal Clerk of Session, who or his assistant clerk on receiving the same must mark thereon the date of lodgment, and if desired grant a receipt therefor in terms of Schedule A annexed to the Rules.¹²

¹ 31 & 32 Vict. c. 125, s. 5.

² *Ibid.*, s. 22.

³ *Line v. Warren*, 1885, 14 Q.B.D. 548.

⁴ *Lovering v. Dawson*, 1875, L.R. 10 C.P. 711.

⁵ *Yates v. Leach*, 1874, L.R. 9 C.P. 605.

⁶ *Tipperary*, 1875, 3 O'M. & H. 19; *Morton v. Galloway*, 1875, L.R. 9 C.P. 173.

⁷ *Waygood v. James*, 1869, L.R. 4 C.P. 361.

⁸ *Tamworth*, 1869, 1 O'M. & H. 77.

⁹ *Harmon v. Park*, 1880, 6 Q.B.D. 323; *Cirencester*, 1893, Day's El. Cas. 3.

¹⁰ *Warrington*, 1869, 1 O'M. & H. 42; *Hackney*, 1874, 2 O'M. & H. 77; *Athlone*, 1874, 2 O'M. & H. 186; *Renfrew*, 1874, 2 O'M. & H. 213; *Greenock*, 1892, Day's El. Cas. 22; Blair's Elect. Manual, p. 402; *South Edinburgh*, 1895, not reported.

¹¹ *Islington*, 1901, 5 O'M. & H. 120.

¹² Rule 1.

SUBSECTION (9).—*Notice of Agents' Names and Addresses.*

852. With the petition the petitioners must leave with the principal clerk a writing signed by them or on their behalf giving the name of the agent appointed by them to act for them, if they have one, or stating that they act for themselves, in either case giving an address within three miles of the General Post Office, Edinburgh, at which notices addressed to him or them may be left.¹ Before service of the petition or at any time after service of the petition¹ the respondent or his agent similarly must give notice of the name of his agent and of his address within the foresaid radius for the receipt of notices.² In either case in default of such notice being left or address given it shall be sufficient to give all requisite notices by fixing the same to a notice board in the office of the principal clerk provided for that purpose.

SUBSECTION (10).—*Security for Expenses.*

853. At the time of presentation of the petition, or within three days afterwards, security has to be given on behalf of the petitioner for the payment of all costs, charges, and expenses that may become payable by him (1) to any person summoned as a witness on his behalf; or (2) to the member whose election or return is complained of. The security to be given amounts to £1000. It must be given either by bond of caution to be entered into by not more than four sureties, or by a deposit of money, or partly in one way and partly in the other.³ If the security is given by bond of caution, the bond must be in the form of Schedule C annexed to the Rules, and lodged with the Principal Clerk of Session of the Division to which the petition is presented, along therewith.⁴ If by deposit, the deposit must be made with the Bank of Scotland, and the deposit-receipt lodged with the Principal Clerk of Session, and be subject to the order of the judges or either of them or of the Court.⁵

SUBSECTION (11).—*Service.*

854. Within five days of the presentation of the petition (inclusive of the day of presentation) the petitioner must serve notices of the presentation, and of the proposed security on the respondent, together with a copy of the petition.⁶ Where the respondent has named an agent, or given an address, the service of an election petition may be by delivery of a copy thereof to the agent or by post to that address.⁷ In other cases the service must be personal on the respondent, unless the judges, or one of them, upon an application made not later than five days after the presentation of the petition, hold other service to be sufficient.

¹ Rule 11.³ 31 & 32 Vict. c. 102, s. 6 (4).⁵ Rule 3 (b).⁶ 31 & 32 Vict. c. 105, s. 8; Rule 5.² Rule 12.⁴ Rule 3 (a).⁷ Rule 13.

SUBSECTION (12).—*Intimation to Returning Officer and Publication by him.*

855. The principal clerk upon the presentation of the petition must forthwith send a copy thereof to the returning officer, and the names and addresses of the agents of the petitioner, and of the respondent respectively; and the returning officer must forthwith publish these particulars along with the petition.¹

SUBSECTION (13).—*Objections to Security.*

856. Any objections to the security for expenses must be in writing, and must set forth the specific ground or grounds thereof, and must be lodged with the principal clerk within five days from the date of service of the notice of the petition and of the security, exclusive of the day of service, and are forthwith heard and decided by the principal clerk.² The specific grounds of objection may be that the cautioners or any of them are insufficient, or that a cautioner is dead, or that he cannot be found or ascertained from the want of a sufficient description in the bond of caution, or that a person named in the bond of caution has not duly acknowledged the same.³ One cautioner in a bond of caution is sufficient.⁴ Where a petition is presented against the return or election of two or more members one security for £1000 is sufficient. A petitioner cannot be a cautioner in the bond of caution.⁵

857. Where an objection to the security tendered is sustained⁶ the principal clerk must state in his deliverance the amount of additional deposit required to make the security sufficient and to remove the objection by such deposit, which must be made within five days from the date of the deliverance. Within the said time, it is in the power of the party to appeal to the election judges or either of them as regards the amount so ordered to be deposited.

SUBSECTION (14).—*Amendment of Petition.*

858. An application for leave to amend a petition whether under the Parliamentary Elections Act, 1868,⁷ or the Corrupt and Illegal Practices Prevention Act, 1883,⁸ must be made to the Division to which the petition belongs, and not to the election judges. The application should be made by a minute and limited to a statement of facts for which leave to amend the petition is asked. In *Buckrose*, a petitioner was allowed to amend his petition by adding allegations of illegal payment, employment, and hiring when committed by persons other than the candidate or his agent.⁹

¹ 31 & 32 Vict. c. 105, s. 7; Rule 15.

² Rule 6.

³ 31 & 32 Vict. c. 105, s. 8.

⁴ *Hereford (City) Election Petition*; *Preece v. Pulley*, 1880, 49 L.J.C.P. 686.

⁵ *Thomas v. Wylie*, 1868, 19 L.T. 498; *Hull Election Petition*; *Pease v. Norwood*, 1878, 38 L.J.C.P. 161.

⁶ Rule 8.

⁷ 31 & 32 Vict. c. 105, ss. 2, 29.

⁸ 46 & 47 Vict. c. 56, s. 40.

⁹ 1886, 4 O'M. & H. 110.

859. The Court has no jurisdiction to allow amendments after the time prescribed by statute by the introduction of fresh substantive charges.¹ Nor will the Court amend a petition by striking out, after the lapse of the time limited by the Act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate), and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency.² In *Manchester*,³ the Court declined to amend a petition alleging that the respondent "was by his agents guilty of general corruption," on the ground that there was no power to amend a petition at the trial. But in *Berwick-upon-Tweed*,⁴ where the petition alleged that the respondent had exceeded the maximum under s. 8 of the Corrupt and Illegal Practices Act without including the word "knowingly," the Court allowed the petition to be amended by the insertion thereof on the ground that no new charge was being introduced.

SUBSECTION (15).—*Interlocutory Matters.*

860. All interlocutory questions and matters, except as to the sufficiency of the security, shall be made upon application in writing to be lodged at the office of the principal clerk, and shall be heard and disposed of by one of the election judges, or, in their absence, by the Lord Ordinary on the Bills.⁵

SUBSECTION (16).—*Withdrawal of Petition.*

861. A petition cannot be withdrawn without the leave of the Court.⁶ Notice of an application for leave to withdraw a petition, in the form of Schedule E to the Regulations, must be in writing, and signed by the petitioner or his agent.⁷ It must state the ground on which the application is intended to be supported, and must be lodged with the principal clerk. A copy of the notice must be given by the petitioner to the respondent and to the returning officer, who must make it public in the county or burgh or burghs to which it relates, and the petitioner must publish forthwith in at least one newspaper circulating in the place such notice as near as may be in the Form F annexed to the Regulations.

SUBSECTION (17).—*Application to be substituted as Petitioner.*

862. The time and place for hearing the application is fixed by one of the judges, or in their absence by the Lord Ordinary on the Bills, and must not be less than one week after the notice of intention to apply has been received by the principal clerk, who must give notice of such hearing to any person who has intimated his intention to apply to be substituted.⁸ The application must be supported by the affidavits

¹ *Youghal*, 1869, 1 O'M. & H. 291.

² *Alridge v. Hurst*, 1876, 1 C.P.D. 410.

³ 1892, Day's El. Cas. 5; 4 O'M. & H. 120.

⁴ 1923, 7 O'M. & H. 1.

⁵ Regulation 24.

⁶ 31 & 32 Vict. c. 125, s. 35; 42 & 43 Vict. c. 75, s. 2.

⁷ Rule 26.

⁸ Rule 28.

of all the parties to the petition and their solicitors, and by the election agents of all the said parties who were candidates at the election, that no agreement or undertaking has been entered into of any kind in relation to the withdrawal, and shall further state the ground on which the petition is sought to be withdrawn.¹ It is not enough for the petitioner and respondent in their affidavits to swear that "to the best of their knowledge, information, and belief the withdrawal of or application to withdraw the petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition." They must make a positive affidavit that they have not been parties to any corrupt arrangement and deny, to the best of their knowledge and belief, that any such arrangement has been made by their agents. The existence of any such arrangement must also be denied by the agents themselves.² Copies of the affidavits must be sent to the Lord Advocate, as public prosecutor, a reasonable time before the hearing.³ If the petitioner makes an application to withdraw during the actual trial there must be an adjournment in order that the statutory notice of withdrawal may be given and other persons have an opportunity of being substituted for the petitioner if they so desire.⁴

863. In every case of withdrawal the Court must report to the Speaker whether in its opinion the withdrawal of the petition was the result of any corrupt arrangement, or in consideration of the withdrawal of any other petition, and the circumstances attending such withdrawal, if they exist. There are heavy penalties exigible where a party is convicted of corrupt practices in respect of the withdrawal of a petition.⁵

864. Within five days from the publication by the returning officer of the notice of intention to withdraw, any person who might have been a petitioner may give notice in writing, signed by him or on his behalf, to the principal clerk of his intention to apply at the hearing to be substituted for the petitioner.⁶ The want or informality of such notice will not defeat such application if in fact made at the hearing, but it may cause postponement and render the applicant liable in costs.

865. If at the hearing the judges are of opinion that the application is due to a corrupt or illegal agreement and substitute an applicant in the petition in place of the petitioner they may order the original security to remain as security for the costs of the substituted petitioner. Failing such order, the substituted petitioner must give security before he can proceed with the petition in the same way as if he were an original petitioner. The petitioner is liable to pay the respondent's costs on leave to withdraw being granted.⁷

¹ 46 & 47 Vict. c. 51, s. 41 (1), (2).

² *Johnson v. Rankin* (*Leominster* Petition), 1880, 5 C.P.D. 553.

³ 46 & 47 Vict. c. 5, s. 41 (4).

⁴ *Hartlepool*, 1869, 19 L.T. 821.

⁵ 46 & 47 Vict. c. 51, s. 41 (4).

⁶ Rule 27.

⁷ 31 & 32 Vict. c. 125, s. 35.

SUBSECTION (18).—*Abatement of Petition.*

866. An election petition is abated by the death of a sole petitioner or of the survivor of several petitioners, but this does not affect the liability of the petitioner for the payment of costs previously incurred.¹ On the death of the petitioner notice thereof must be given in the county or burgh to which the petition relates in the same manner as notice of an application to withdraw a petition, and within one calendar month after such notice is given, or within such further period as the judges may allow, any person who might have been an original petitioner may apply to the judges, or in their absence to the Lord Ordinary on the Bills, to be substituted as a petitioner.² Although there is no express provision in the Act, according to the old practice a pending petition is abated or dropped by a dissolution of Parliament before the hearing of such petition, and the Court will order the sum deposited by the petitioner in security for costs to be returned to him.³

SUBSECTION (19).—*Substitution of Respondent.*

867. If before the trial the respondent (*a*) dies, (*b*) is summoned to Parliament as a peer of Great Britain, or (*c*) gives due notice to the Court that he does not intend to oppose the petition, or (*d*) if the House of Commons has resolved that his seat is vacant, notice of such event having taken place is to be given in the county or burgh to which the petition relates, and any person who might have been a petitioner may within ten days after such notice is given, or such further time as the judges may allow, apply to be admitted,⁴ and such person or persons not exceeding three in number may be admitted either with the respondent, if there is a respondent, or in place of the respondent.⁵ The manner and time of the respondent's giving notice that he does not intend to oppose the petition is by leaving notice signed by him at the office of the principal clerk six days before the day appointed for trial, exclusive of the day of leaving such notice. The principal clerk is forthwith to send a copy thereof to the petitioner or his agent, and to the returning officer who is to cause it to be published in the county or burgh.⁶ Notice of the other events mentioned may be given by any person entitled to be a petitioner by causing it to be published in at least one newspaper circulating in the county or burgh, and by leaving a copy signed by him or on his behalf with the returning officer, and a like copy with the principal clerk.⁷

868. Upon the respondent giving notice that he does not intend to oppose the petition, he is not to be allowed to appear or act in any proceedings thereon or to sit or vote in the House of Commons until it has been informed of the report of the petition, and the Court or

¹ 31 & 32 Vict. c. 125, s. 37.

³ *Carter v. Mills* (*Exeter* Petition), 1874, L.R. 9 C.P. 117.

⁴ 31 & 32 Vict. c. 125, ss. 37 and 38.

⁵ Rule 32.

⁶ Rule 31.

² Rule 29.

⁷ Rule 30.

judge is in all cases in which such notice has been given in the prescribed time and manner to report the same to the Speaker of the House of Commons.¹

SUBSECTION (20).—*Double Return Petition—Respondent declining to Defend.*

869. Where the petition complains of a double return, and the respondent has given notice that he does not intend to oppose the petition, and no person has been substituted respondent under the Act, the petitioner, if there is no petition against the other member returned, may withdraw his petition by giving notice to the principal clerk to the Division to which the petition was presented, and the principal clerk must report the fact of the withdrawal to the Speaker, and the House of Commons shall therefore give the necessary directions for amending the said double return by taking off the file the indenture by which the respondent so declining to oppose the petition was returned.²

SUBSECTION (21).—*Special Case.*

870. Where upon the application of any party to a petition, it appears to the Court that the case raised by the petition can be conveniently stated as a special case, the Court may direct the same to be stated accordingly. Any such special case shall, as far as may be, be heard before the Court, and the decision of the Court shall be final; and the Court must certify to the Speaker its determination in reference to such special case.³ The application to state a special case must be made by motion to the Division of the Court to which the petition has been presented when sitting, or to the Lord Ordinary on the Bills in time of vacation; on which motion the parties must be heard, and the application be disposed of either by adjustment of a special case when allowed or by refusal of the application.⁴ The application must be made before the Court has given its decision. A case as to the validity of certain votes was refused on that ground.⁵

871. At the trial of a petition the judges may reserve any questions of law as to the admissibility of evidence or otherwise, and submit them in a special case to the Division to which the petition was presented.⁶

SUBSECTION (22).—*Procedure prior to Trial of Petition.*

(i) *Particulars.*

872. Evidence does not need to be stated in the petition. But on the requisition of the respondent, the Court or either of the election judges may order the petitioner to lodge with the principal clerk, and to serve on the respondent or his agent within such period prior to the date

¹ 31 & 32 Vict. c. 125, s. 39.

² 30 & 31 Vict. c. 102, s. 11 (16); Rule 20.

³ *Londonderry*, 1886, 4 O'M. & H. 103.

⁴ *Ibid.*, s. 40.

⁵ Rule 20.

⁶ 30 & 31 Vict. c. 102, s. 12; Rule 22.

fixed for the trial as may in the circumstances be deemed right, a written statement of such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial.¹ No evidence is received at the trial except as to matters within the written statement of particulars ordered as aforesaid, and tending to support the same, or matters which have been already sufficiently set forth in the petition, without the leave of the Court or the election judges, and upon such conditions as to the postponement of the trial, payment of costs, and otherwise as may be ordered.² The time fixed for lodging and serving the statement of particulars must depend upon and vary according to the circumstances of each case. In *Wigtown*³ ten days before the trial was fixed, and immediately before in *Dumbarton*⁴ and *Buteshire*⁵ eight and twelve days were fixed respectively, while in *Elgin and Nairn*⁶ twenty-one days prior to the trial was fixed. All these were petitions alleging bribery, treating, and corrupt practices. The English Courts have exercised a similar discretion, and have fixed dates varying from five days to twenty-one days prior to the date of trial.

873. The particulars should be specific, and should be limited to those charges which the petitioner actually has the means, or expects to have the means, of establishing at the trial. No particulars should include charges unless the petitioner has in his possession some evidence in support of them which he can lay before the Court. Suspicion is not sufficient to justify the insertion of a charge in the particulars. That may justify the wideness of the petition, but it does not justify the wideness of the particulars, because they are intended to be proved against the respondent, and it is necessary for his defence that he should at once incur the expense of investigating those cases and of preparing for trial.⁷ The sufficiency or relevancy of the statement of particulars may be objected to by the respondent, and an amended or additional specification may be ordered.⁶

874. Where the charges are of bribery and treating the particulars should specify (1) the names of the persons said to have been bribed or treated, (2) their numbers on the roll of electors, (3) the times when and (4) the places where the acts were committed, (5) the persons by whom the acts of bribery and treating were committed, and (6) in the case of bribery the form in which it was committed. In *Elgin and Nairn*,⁶ where the particulars omitted to specify the places where the alleged acts of bribery and treating were committed and the form in which the bribery was effected, the Court held that the specification was insufficient and the statement was ordered to be amended to furnish these particulars. Where charges alleged illegal practices in respect of illegal payments by the election agents and by political associations, specified certain political associations and generally alleged payments

¹ Rule 36.

² Rule 37.

³ 1880, 7 R. 1170.

⁴ Not reported.

⁵ Not reported.

⁶ *Hood v. Gordon*, 1895, 23 R. 171.

⁷ *Pontefract*, 1892, 4 O'M. & H. 200, per Cave J. at p. 202.

by these associations in connection with holding meetings, providing and distributing literature, and otherwise making payments to promote the candidature of the respondent, the particulars were held irrelevant in respect they did not state the individuals through whom the alleged payments by the different political associations were made, and the particular items complained of.

875. In *Elgin and Nairn*¹ the petitioners, along with their statement of particulars, lodged a specification of writings, for the recovery of which they craved a diligence. The Court, setting aside the case of *Wigtown*² and the unreported case of *Dumbarton*, where diligences unopposed had been granted, approved of and followed the English decision in *Moore v. Kennard*,³ and refused the application, holding that they had no jurisdiction to grant the diligence.

(ii) *Warrant to Cite Witnesses.*

876. The warrant for citation of witnesses for the trial is issued by the judges on the application of any party to the trial, and is in the form prescribed in Schedule D to the Regulations.⁴ In *Elgin and Nairn*¹ the petitioners, after being refused a diligence for the recovery of documents, presented a note, in which they craved a warrant to cite witnesses and havers to attend the trial, and subjoined a list of the names of the persons to be cited as such, which was opposed on the ground that there was no power under Rule 23 and Schedule D to do so. In granting the application Lord M'Laren said: "We thought it was not in accordance with the general law of elections to grant recoveries before trials, therefore it rather appears to me that in granting diligence against witnesses and havers, we imply nothing more than that the witnesses may be called upon to produce the documents relative to the case, the relevancy to be determined of course by the Court." And Lord Kyllachy said: "A citation of havers merely gives the witness notice that he is called upon to produce documents at the trial. Whether he shall produce them at the trial will depend upon what we decide upon objection by him, or upon objection by the other side, or upon objection by ourselves."

877. The reasonable costs of any witness are to be ascertained by the clerk of Court, and upon a certificate under his hand allowing the same, the said costs must in the first instance be paid by the party adducing such witness.¹

SUBSECTION (23).—*Recount.*

878. A recount is usually asked for to rectify some error or omission which has occurred in ascertaining the result of the election, and should be made with as little delay as possible. The petitioner claims the seat

¹ *Hood v. Gordon*, 1895, 23 R. 171.

² *Boyd & O'Kane v. Stewart (Wigtown case)*, 1895, 23 R. 171, at p. 177.

³ 1883, 10 Q.B.D. 290.

⁴ Rule 23, Schedule D.

on the ground that he had a majority of lawful votes, and asks for a recount of the votes to establish his claim, without alleging any corrupt or illegal practice. The returning officer must be called as a respondent.¹ In *Renfrew*,² where the returning officer by minute consented to the inquiry, the recount took place at the trial, and eight enumerators were sworn to recount the ballot papers, and after hearing parties the petition was granted. And in *Stepney*,³ Denman J. counted the votes himself.

879. The former practice has been considerably modified. If expedition is desired the respondent may accept service and dispense with the *inducia*, when the Division to whom the petition is presented, if the parties consent, will appoint the trial of the petition to proceed at Edinburgh. The election judges then fix the date of the trial. The further procedure is: A warrant is granted by the election judges for transmission by the sheriff-clerk of the county in which the constituency is situate of the ballot papers, counterfoils, marked register of voters, and other documents used at the election to the principal clerk of Court, and an order is made for these sealed packets of counted and rejected ballot papers on a date fixed to be reopened and inspected by counsel and agents for the respective parties at the sight of the principal clerk of Court. At this inspection any voting paper not agreed upon is put on one side, and the votes admitted are recounted for each candidate. The result of the inspection is reported by the principal clerk to the election judges along with the disputed voting papers. At the date fixed for the trial parties are heard on the disputed voting papers, and these, so far as admitted by the Court, are added to the number of votes of the favoured candidate, and the election judges grant or refuse the petition in accordance with the result. The election judges or the Lord Ordinary on the Bills subsequently grants an order for retransmission of the whole documents by the principal clerk to the sheriff-clerk of the county in which the constituency is situate.⁴

880. As it is not asked that the election should be declared void, the only questions which can be in dispute and dealt with are the validity of the admission or rejection of particular votes for either candidate, or the omission to include in the count a number of votes altogether, as in *Greenock*,⁴ where the morning after the election two bundles of voting papers were found to have been omitted.

SUBSECTION (24).—*Scrutiny.*

881. When the petitioner does not seek to avoid the election on the ground of corrupt or illegal practices by the respondent, but only claims the seat for the unsuccessful candidate on the ground that he had a majority of legal votes and asks for a scrutiny, a special proceeding is applicable prior to and at the trial. A scrutiny consists in each party challenging the votes recorded for his opponent, and having struck off

¹ *Irwin v. Mure*, 1874, 1 R. 834.

² 1874, 2 O'M. & H. 213.

³ 1886, 4 O'M. & H. 49.

⁴ *Greenock*, 1892, Blair's Elect. Manual, 402; *South Edinburgh*, 1895, not reported.

any to which he can establish a fatal objection, and having added to his own poll any votes which have been improperly disallowed by the returning officer or duly tendered votes which have been refused by the presiding officer.¹

882. When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of and the party defending the election or return must, six days before the day appointed for trial, respectively deliver to the principal clerk a list of the votes intended to be objected to and of the objections to each such voter, and the principal clerk must allow inspection of such list to all parties concerned; and no evidence may be allowed to be given against any vote or in support of any objection which is not specified in the list, except by leave of the judges or one of them upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered.² Under this rule the petitioner and the respondent are put on an equality, and the Court has no jurisdiction to order delivery of particulars of objections to the votes under Rule 36. Where a list has not been delivered in time, the Court has no power to allow a further list to be received or to allow evidence against the validity of votes.³

883. Lists should not challenge the validity of votes except upon legal grounds and upon definite information. Care should also be taken that they cover the whole ground of the party's case. Votes on a scrutiny may be challenged on any of the following grounds: (1) Of persons prohibited at common law or by statute from voting, when otherwise qualified, *e.g.* a minor or an alien, but not persons who are in fact on the register of voters, even if they could be successfully objected to on a revision of the register; (2) of persons whose votes have been procured by bribery, treating, or undue influence;⁴ (3) of votes procured by personation;⁵ (4) of votes not complying with the requirements of Rule 36 of the Ballot Act; (5) of a vote given by a person at the wrong polling-station;⁶ (6) of persons on the absent voters list who vote in person;⁷ and (7) of persons who vote for a disqualified candidate, but the disqualification must have (*a*) existed at the date of the election, (*b*) been in the knowledge of the person when voting, and (*c*) been publicly intimated, and these facts should be stated in the list.⁸ It is further essential to ascertain for whom the party actually voted before inserting him in a list of objections. A voter called as a witness may not be asked for whom he voted.⁹ Through failure to take this precaution in *Finsbury*¹⁰ the petitioner in one

¹ *Anstruther v. Williamson* (St. Andrews case), 1886, 23 R. 577; *Stepney*, 1882, 4 O'M. & H. 43; *Cirencester*, 1893, 4 O'M. & H. 184.

² Rule 9.

³ *Furness v. Beresford* (York Petition), [1895] 1 Q.B.D. 495; *Neild v. Batty*, 1874, L.R. 9 C.P. 104.

⁴ *Brentford*, 1869, 1 O'M. & H. 40.

⁵ Ballot Act, s. 24.

⁶ *Oldham*, 1869, 1 O'M. & H. 163.

⁷ 10 & 11 Geo. V. c. 35, s. 2 (1).

⁸ *Beresford Hope v. Sandhurst*, 1889, 23 Q.B.D. 79.

⁹ Ballot Act, s. 12.

¹⁰ 1892, Day's El. Cas. 50.

morning succeeded in striking three votes off his own poll, and in *Exeter*¹ the respondent on one occasion struck off five votes from his own score.

884. The general rule is that every vote proved invalid at a scrutiny is struck off the score of the party—petitioner or respondent—who is shewn to have received it. A vote will be held invalid if obtained by bribery, treating, or undue influence.² In *Boston*,³ where the respondent had been unseated for corruptly distributing through his election agent coal to upwards of 800 electors, the Court held that there was a *prima facie* case of corrupt practices against the voters, in the absence of any explanation by them, sufficient to justify their votes being struck off, and that the petitioner was entitled to the seat upon a sufficient number of such votes being struck off to put him in a majority.

885. At the trial on a scrutiny the objections stated in the petitioner's list are first considered and determined *seriatim*, and votes are struck off the respondent's poll or added to the petitioner's poll as the Court may determine. When the result is to give the petitioner an apparent majority, the respondent's list is then similarly dealt with. Each party is confined to his own list and cannot, except by leave of the Court on special grounds, select from his opponent's list an objection he is not prepared to proceed with.⁴ If when the respondent's list is exhausted the petitioner still has an apparent majority, he may find that he has achieved only a pyrrhic victory. The respondent may, as if he had been a petitioner, lead recriminatory evidence to shew that the person claiming the seat was unduly elected. A condition precedent to his being entitled to do so is, that he must, six days before the day appointed for trial, deliver to the principal clerk a list of the objections to the election upon which he intends to rely; and no evidence may be allowed to be given by a respondent in support of any objection to the election not specified in the list except by leave of the judges or one of them, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered.⁵ Under this rule the respondent is placed under the same obligation of disclosure as if he were the petitioner *quoad* his recriminatory case, and may be called on for particulars under Rule 36 of the character of any corrupt or illegal practice founded on. Although the practice in England is not uniform—there have been no decisions in Scotland—it is usual where the petitioner makes charges of corrupt practices to take the recriminatory case first.⁵ If both the petitioner and the respondent are proved to have committed such practices the seat is voided. If, however, the petitioner fails to prove that the respondent has been guilty of corrupt practices, and the respondent then establishes his recriminatory case, the petitioner still has the right to go into the scrutiny for the purpose of unseating the respondent, because if he succeeded in shewing that the respondent had not a majority of legal votes, although in consequence

¹ 1914, 6 O'M. & H. 235.

² Ballot Act, s. 25.

³ *Malcolm v. Parry*, 1874, L.R. 9 C.P. 610.

⁴ *Finsbury*, 1892, Day's El. Cas. 47.

⁵ Rule 10.

of the success in the recriminatory case the defeated candidate would not be seated, still the voters would be entitled to a new election.¹

886. Recriminatory evidence cannot be led if the petitioner withdraws his claim to the seat, when he has established that the respondent's election is void on account of corrupt practices. If the whole petition is withdrawn, the respondent cannot go into the recriminatory case, but leave to withdraw is not readily granted. If a recount is to be asked it should be applied for at an early stage in a scrutiny inquiry.² If at the termination of a scrutiny the votes are equal the election is void.³

SUBSECTION (25).—*Trial.*

(i) *Time and Place of Trial.*

887. Every election petition is tried by two election judges, with the same powers, jurisdictions, and authority as a judge of the Court of Session presiding at the trial of a civil case without a jury.⁴ The judges fix the time and place of trial. The trial must take place in the burgh or county to which the petition relates, unless in the opinion of the Court special circumstances exist which render it desirable that it should be tried elsewhere, when the Court may appoint such other place as may appear most convenient.⁵ Prevalence of intimidation and want of suitable accommodation have been held special circumstances for changing the venue.⁶ In *Greenock* the inquiry and recount took place in Edinburgh.

(ii) *Notice of Trial.*

888. Fifteen days before the day appointed for the trial the principal clerk of the Division to which the petition is presented must fix on the notice board at his office and send to the petitioner and the respondent and also to the returning officer a copy of the notice, stating the time and place of trial. On receipt of his copy the returning officer must forthwith publish it in the county or burgh or burghs to which it relates. It is provided that such notice shall not be vitiated by any miscarriage of or relating to the copies to be sent as directed.⁷

(iii) *Postponement of Trial.*

889. Either of the judges may from time to time by order made upon the application of any party to the petition, or by notice in such form as the judge may direct to be sent to the returning officer, postpone the beginning of the trial to such day as he may name, and such notice when received must be forthwith made public by the returning officer.⁸

¹ *Southampton*, 1869, 1 O'M. & H. 225, per Willes J.

² *Stepney*, 1886, 4 O'M. & H. 49.

³ *Cirencester*, 1893, 4 O'M. & H. 189.

⁴ 31 & 32 Vict. c. 125, ss. 11 (9), 58 (15).

⁵ *Ibid.*, s. 11 (11).

⁶ *Sligo*, 1869, 1 O'M. & H. 300; *Hexham*, 1892, Day's El. Cas. 26.

⁷ Rules 16 and 17.

⁸ Rule 19.

(iv) *Clerk of Court.*

890. An officer to be named by the principal clerk, with the sanction of the election judges, must attend and discharge the duties of clerk of Court, in like manner and to like effect as the clerks of the Circuit Courts of Justiciary, and must, subject to the directions and orders of the Court, keep a record of the proceedings at the trial, which is conducted in like manner as trials are conducted in said Circuit Courts of Justiciary. The record of the proceedings at the trial must be transmitted by said officer to the principal clerk.¹

(v) *Shorthand Writer.*

891. The shorthand writer of the House of Commons or his deputy is to attend and take down the evidence given at the trial, and from time to time write, or cause the same to be written at length, and a copy of such evidence is to accompany the certificate made by the judges to the Speaker. The expenses of the shorthand writer are to be deemed to be part of the expenses incurred by the judges.²

(vi) *Public Prosecutor.*

892. The Lord Advocate must be represented at the trial by one of his Deputes, or by the Procurator-Fiscal of the Sheriff Court of the district.³ The duties of the Advocate-Depute or Procurator-Fiscal are: (a) To give all necessary assistance to the Court in the citation of witnesses and the recovery of documents; (b) to report to the Lord Advocate the issue by the Court of a warrant for the apprehension of any person in respect of a corrupt or illegal practice;⁴ and (c) to report to the Lord Advocate any person who has not received a certificate of indemnity who appeared to him to have been guilty of a corrupt or illegal practice, in order to have such person brought to trial, although no warrant has been issued by the Court.⁵ The duty of the Public Prosecutor has been resumed thus: "The only duty of a Public Prosecutor at the trial of an election petition is to attend the Court and wait until the Court invites his intervention. I do not think that it was ever intended to give him a separate *locus standi*. There may be cases where witnesses are allowed to leave the box without being cross-examined, and where the Court may think that in the public interest they ought to be cross-examined. In such a case they would call for the intervention of the Public Prosecutor."⁶ The Advocate-Depute or Procurator-Fiscal does not have the duty or power conferred on the representative of the Director of Public Prosecutions in England,⁷ to cause any person who appears to him to be able to give material evidence to attend the trial, and with the leave of the Court to examine such person as a witness.

¹ Rule 21.² *Ibid.*, s. 68 (3) (a).³ *Ibid.*, s. 68 (3) (b).⁴ 31 & 32 Vict. c. 125, ss. 24, 58 (14).⁵ *Ibid.*, s. 68 (3) (c).⁶ *Montgomery*, 1892, 4 O'M. & H. 168, per Wills J.; *Hexham*, 1892, 4 O'M. & H. 143; *Rochester*, 1892, 4 O'M. & H. 157.⁷ 46 & 47 Vict. c. 51, s. 43 (2).

(vii) *Witnesses summoned by the Court.*

893. The election judges may at the trial by an order under their hands compel the attendance as a witness of any person who appears to them to have been concerned in the election.¹ Refusal to obey such an order is contempt of Court. The judges may examine any witness so compelled to attend or any person in Court, although such witness is not called and examined by any party to the petition. After examination by the judges such witness may be cross-examined by or on behalf of the petitioner and respondent or either of them. The reasonable expenses of such witnesses are to be deemed part of the expenses of the election judges. This course is adopted usually when the petitioner no longer contests the case or the respondent admits his inability to do so before the charges and counter-charges are exhausted.² The Court have either insisted on the case continuing or have directed the Public Prosecutor to call further evidence.³

(viii) *Evidence.*

894. The petitioner opens and leads evidence in support of his case. The general rules of evidence with certain limitations apply. It is customary to dispense with formal proof of the holding of the election and the return of the respondent, the onus being upon the respondent to challenge the right to petition. If necessary they are proved by the returning officer.⁴ Documents in the custody of the returning officer or other official should be recovered by citation of him as a haver at the trial. Where an order is made for the production by the Clerk of the Crown in Chancery of any documents in his possession, the production by him or his agent of such documents is conclusive evidence that they relate to the election in question.⁵ Where there has been a recount before the trial, the report of the result should be produced at the trial. The production of telegrams by officers of the Post Office may be ordered. No objection can be taken to the production of documents on the ground of absence or insufficiency of stamps.⁶ Where the case for the petitioner falls under several heads or branches it is the practice of the Court to hear evidence and dispose of one branch of the case before considering the other branches.⁷

(ix) *Evidence of Corrupt Practices.*

895. Unless the judge otherwise directs, any charge of a corrupt practice may be gone into and evidence in relation thereto received,

¹ 31 & 32 Vict. c. 125, s. 32.

² *Hexham*, 1892, 4 O'M. & H. 143; *Montgomery*, 1892, 4 O'M. & H. 168; *North Meath*, 1892, 4 O'M. & H. 149; *South Meath*, 1892, 4 O'M. & H. 130; *Maidstone*, 1901, 5 O'M. & H. 149; *Monmouth*, 1901, 5 O'M. & H. 167; *Worcester*, 1906, 5 O'M. & H. 215; *Hartlepool*, 1910, 6 O'M. & H. 15; *North Louth*, 1911, 6 O'M. & H. 103; *Cheltenham*, 1911, 6 O'M. & H. 207.

³ *Walsall*, 1892, Day's El. Cas. 73.

⁴ Ballot Act, Rule 43.

⁵ *Bolton*, 1874, 2 O'M. & H. 139; *Harwich*, 1880, 3 O'M. & H. 62.

⁶ *Windsor*, 1869, 1 O'M. & H. 6; 54 & 55 Vict. c. 39, s. 14 (4).

⁷ *Elgin and Nairn* (*Hood v. Gordon*), 1895, 23 R. 178, at p. 153.

before any proof has been given of agency on the part of the candidate in respect of such corrupt practice.¹ This is a modification of the ordinary rule regarding proof of agency. In *Bristol*,² where collective acts of bribery were alleged against one person, Bramwell B. required the petitioner before going into the alleged acts to prove the agency of the person, and said: "Although the statute says that you may, unless the judge otherwise orders, prove bribery before agency, it is desirable that the proof should not be given, unless there is a reasonable expectation of proving the agency afterwards."

896. Where the petitioner makes out a *prima facie* case of agency it must be accepted unless rebutted by the respondent.³ Admissions of being bribed made by persons not parties to the petition are inadmissible.⁴ Confessions by persons bribed are not conclusive.⁵ Evidence of a promise made to A by B on an earlier day than the dates in the particulars was admitted as a link in the chain of proof of bribery.⁶ Evidence of numerous cases of individual treating not specified in the particulars is not admissible to prove general treating, and evidence of corruption at previous elections by the political party to which the petitioners belong is irrelevant.⁷ Evidence of corrupt payments made by an agent after the election is admissible.⁸ When evidence of bribery by an active supporter of the respondent is given the Court will draw unfavourable conclusions from the neglect or refusal of the person so charged to explain his conduct in the witness-box.⁹ Evidence in cases of personation was allowed to be given before proof of agency, and evidence of conversations with an agent after the poll was admitted.⁷ A statement by a deceased person is not evidence against the respondent,¹⁰ but the admissions of the original respondent are evidence against a substituted respondent.¹¹ A petitioner is not entitled to call for the production of the respondent's agent's private bank account to ascertain whether there was anything in it which would assist his case, unless some foundation has been laid for so doing.¹² Where the account books of a political association are called for, the inspection will be limited to the entries referring to the dates and persons mentioned in the particulars, and a roving commission of inquiry will not be allowed.¹³ The banking account of the respondent's committee is not evidence against the respondent by itself, but must be proved item by item.¹⁴ Questions as to the total income and expenditure of a political association of which the respondent was a member and his own contributions thereto were

¹ 31 & 32 Vict. c. 125, s. 17.

² 1870, 2 O'M. & H. 29.

³ *Birbeck v. Bullard*, 1886, 4 O'M. & H. 84; 54 L.T. 625; *Guildford*, 1869, 1 O'M. & H. 13; *Bristol*, 1870, 2 O'M. & H. 29.

⁴ *Great Yarmouth Borough*, 1906, 5 O'M. & H. 176.

⁵ *Worcester*, 1906, 5 O'M. & H. 213.

⁶ *Stroud*, 1874, 2 O'M. & H. 107.

⁷ *Collins v. Price*, 1880, 44 L.T. 192.

⁸ *Spencer v. Harrison*, 1880, 44 L.T. 283.

⁹ *Burton v. Garfit*, 1880, 44 L.T. 297.

¹⁰ *Belfast*, 1886, 4 O'M. & H. 105.

¹¹ *Londonderry*, 1869, 1 O'M. & H. 276.

¹² *Tipperary*, 1875, 3 O'M. & H. 34.

¹³ *Tamworth*, 1869, 1 O'M. & H. 76.

¹⁴ *Maidstone*, 1906, 5 O'M. & H. 204; *East Cork*, 1911, 6 O'M. & H. 320.

disallowed.¹ If the seat is claimed on behalf of a defeated candidate, evidence may be given in support of recriminatory charges against him even although he is not a petitioner or party to the petition.²

897. The practice of questioning witnesses waiting to be examined or of obtaining a signed statement from them has been criticised by the Court. "It is a most improper proceeding to take a statement from a man who has already made one to the other side. The object, no doubt, is to make the man's evidence of no value, and no doubt it would do so in an ordinary case. It does not have that effect in these cases, but it is a most improper and a most dangerous thing to do, and it has been condemned again and again by judges who have tried election petitions."³

SUBSECTION (26).—*Relief.*

898. Where upon the trial of an election petition, the election court reports that the candidate has been guilty by his agents of all or any of the offences of (a) treating, (b) undue influence, or (c) illegal practices, and further reports that the respondent has proved to the Court:

- (a) that no corrupt or illegal practice was committed at the election by the candidate or his election agent, and that the offences mentioned in the report were committed contrary to the orders and without the sanction or connivance of the candidate or his election agent;
 - (b) that the candidate and his election agent took all reasonable means to prevent corrupt and illegal practices;
 - (c) that the offences were of a trivial, unimportant, and limited character; and
 - (d) that in all other respects the election was free from any corrupt or illegal practice on the part of the candidate and of his agents;
- then the election is not avoided by reason of the offences mentioned in the report, nor is the candidate subject to any incapacity under the Corrupt Practices Act, 1883.⁴

899. Where on application made, it is shewn to the Court of Session or an election Court by such evidence as seems to the Court sufficient:

- (a) that any act or omission of a candidate at an election, or of his election agent, or of any other agent or person, but for being excepted would be an illegal practice, payment, or hiring;
- (b) that such act or omission arose from inadvertence, or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith; and
- (c) that such notice of the application has been given in the county or borough for which the election was held, as to the Court seems fit;

¹ *Elgin and Nairn (Hood v. Gordon)*, 1895, 23 R. 182.

² *Stevens v. Tillet*, 1870, L.R. 6 C.P. 147.

³ *Worcester*, 1906, 5 O'M. & H. 214, per Lawrence J. ⁴ 46 & 47 Vict. c. 51, s. 22.

and under the circumstances it seems to the Court to be just that the candidate, or such election or other agent, or person, or any of them should not be subject to any of the consequences under the Act of the said act or omission, the Court may make an order allowing such act or omission to be an exception from the provisions of the Act, which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate, agent, or person shall not be subject to any of the consequences under the Act of the said act or omission.¹

900. The general principles embodied in these sections have been explained by Vaughan Williams J., who, in *Rochester*,² said: "The intention of the Corrupt and Illegal Practices Prevention Act, 1883, was to draw the strings of the law as tightly round corrupt and illegal practices as possible, but at the same time the law intends by ss. 22 and 23 to enable judges to relieve candidates from all responsibility for corrupt and illegal practices, where they satisfy the judges that they have done everything on their part to render the election pure and free from corruption. . . . Those who stand for Parliament must feel the full responsibility of personally taking care that those whom they allow to act as their agents are not guilty of corrupt and illegal practices, and if they fail to do that they disentitle themselves to the relief from the consequences of the acts of others which judges are entitled to give them under s. 22." And in *Stepney Borough*:³ "It is quite true that the Act lays down most stringent rules as to the conduct of candidates. It may be said that these rules go so far into detail as to make it very difficult for either the candidate or his election agent to go through an election without in some way or other transgressing against the multifarious provisions of those Acts, but the answer to this is that the Act takes every possible care by the 22nd and 23rd sections that no candidate who has tried his best to conduct his election purely and fairly shall suffer thereby."

901. Where the respondent has to rely upon relief under s. 22 to prevent his seat being forfeited, which can be obtained only in a pending election petition, it will be necessary for him to lead evidence to establish the four conditions upon which the Court must be satisfied, as it is upon such evidence alone that the Court can proceed. The more important point is to satisfy the Court that the act for which relief is sought arose from "inadvertence," or "other reasonable cause of a like nature." The section is intentionally very carefully guarded and has always been limited by the Courts to small and accidental mistakes.⁴ In granting relief in *Clark v. Sutherland*⁵ to a candidate who had acted as his own election agent and had failed timeously to make the statutory return, Lord President Robertson said: "A deliberate disregard of the statute could never be treated as inadvertence. . . . I

¹ 46 & 47 Vict. c. 51, s. 23. ² 1892, 4 O'M. & H. 160. ³ 1892, Day's El. Cas. 124.

⁴ *Southampton*, 1905, 5 O'M. & H. 17, per Wright J. at p. 23.

⁵ 1897, 24 R. 821, at p. 830.

think, and it is necessary to say this, that the petitioner's duties as agent were performed in a negligent manner. But the fact that he is not a good or efficient agent must not affect our consideration of the manner in which he has left undone the statutory duties of a candidate. And while in face of these several violations of the statute it is impossible to speak of them otherwise than with reprehension, yet we have to remember that in the exercise of our present jurisdiction we are necessarily in the region of what is, in greater or less degree, blameable, because it requires an excuse."

902. The section has been interpreted in different ways in the English Courts. In *West Bromwich*,¹ in refusing relief on the ground of ignorance of the law where a committee-room was used which communicated with a shop in which refreshments were sold by a side door, Ridley J. said: "Now it is said that ought to be treated as an inadvertence, a word which is capable of several interpretations, and which has been interpreted in various ways not always, I think, consistent with each other. It may mean mere thoughtlessness, it may mean what is equivalent to a mere mistake, but in this case it was also an ignorance of the law. There is a case in 1892—*Stepney*²—in which Cave J. allowed that there might be relief given under s. 23 where the Act of Parliament was recent and possibly was not completely known. It is an Act of Parliament which contains many rather multifarious directions, and it is possible in those days, which are now some distance from us, that persons might fairly be described as acting inadvertently because they did not know the law. But I think things are different now, and it seems to me that where an agent or person entrusted with authority by the election agent goes to take a room of this kind he ought to know the law. . . . Inadvertence does not cover a case where in the immediate duty which he is performing he ought to have full knowledge of the law." In *Southampton*,³ where two joint candidates were respondents, the Court, while holding that a payment of 2s. to a voter for his fare was in the circumstances "trivial and unimportant," differentiated between the candidates in relation thereto, declared the election of one candidate void, and granted relief to the other candidate.

903. Relief under s. 23 can be applied for otherwise than in the course of an election petition. Where the application is made where there is no pending petition the procedure is as already explained with reference to applications under s. 34.⁴

SUBSECTION (27).—*Certificate and Report.*

904. At the conclusion of the trial the election judges determine whether the member, whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and forthwith certify in writing such determination

¹ 1911, 6 O'M. & H. 286.

² 1892, 4 O'M. & H. 178.

³ 1895, 5 O'M. & H. 20.

⁴ See para. 739, *supra*.

to the Speaker, and upon such certificate being given such determination is final to all intents and purposes.¹

905. Where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judges must, in addition to such certificate, and at the same time, report in writing to the Speaker as follows:—

- (a) Whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt or illegal practice.
- (b) The names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice; and whether those persons have or have not been furnished with certificates of indemnity.
- (c) Whether corrupt or illegal practices have, or whether there is reason to believe that corrupt or illegal practices have, extensively prevailed at the election to which the petition relates.
- (d) Whether any candidate has been guilty by his agents of any corrupt or illegal practice.²

The judges may at the same time render a special report to the Speaker as to any matters arising in the course of the trial, an account of which in their judgment ought to be submitted to the House of Commons.³

906. Every certificate and every report sent to the Speaker as aforesaid must be under the hands of both judges, and if the judges differ as to whether the member whose return or election is complained of was duly returned or elected, they shall certify that difference, and the member shall be deemed to be duly elected or returned. If the judges determine that such member was not duly elected or returned, but differ as to the rest of the determination, they shall certify that difference, and the election shall be deemed to be void; and if the judges differ as to the subject of a report to the Speaker, they shall certify that difference and make no report on the subject on which they so differ.⁴

907. There is a distinction drawn between the report made and the certificate granted by the judges. A report that the judges believed that the petitioner, in a petition where the sitting member was unseated, had been perfectly pure in his conduct at that election will not prevent allegations of bribery thereat being gone into in an election petition against his subsequent election.⁵ On the other hand, where in a petition the seat is claimed for a defeated candidate, and the judges certify that such candidate is duly elected, the certificate is final, and the validity of such candidate's right to the seat cannot be challenged.⁶

908. Where the judges report that corrupt practices have, or that there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates, Election Com-

¹ 31 & 32 Vict. c. 125, s. 11 (13).

³ *Ibid.*, s. 11 (15).

⁵ *Stevens v. Tillet*, 1869, L.R. 6 C.P. 147.

² *Ibid.*, s. 11 (14).

⁴ 42 & 43 Vict. c. 75, s. 2.

⁶ *Waygood v. James*, 1869, L.R. 4 C.P. 361.

missioners are appointed under the Election Commissioners Act, 1852,¹ by the Crown on a joint address from both Houses of Parliament, or upon a petition to the House of Commons by any two or more electors of the borough or county presented within twenty-one days after the return to the Clerk of the Crown in Chancery of the member in respect of such constituency, or within fourteen days after the meeting of Parliament to the same purport, to inquire into the same. The Commissioners can also inquire into and report as to the existence of illegal practices.²

909. Before a person, not being a party to an election petition, or a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Court, and before any person is reported by Election Commissioners to have been guilty at an election of any corrupt or illegal practice, the Court or Commissioners as the case may be shall cause notice to be given to such person, and if he appear, in pursuance of the notice, shall give him an opportunity of calling evidence in his defence to show why he should not be so reported.³ Every person reported by Election Commissioners to have been guilty at an election of any corrupt or illegal practice may appeal against such report to the next Circuit Court of Justiciary held in and for the county or place in which the offence is alleged to have been committed.⁴

SUBSECTION (28).—*Certificate of Indemnity to Witness.*

910. A person who is called as a witness respecting an election before any Election Court is not to be excused from answering any question relating to any offence at or in connection with such election, on the ground that the answers thereto may criminate or tend to criminate himself, or on the ground of privilege; provided that: (a) a witness, who truly answers all questions which he is required by the Election Court to answer shall be entitled to receive a certificate of indemnity under the hand of a member of the Court stating that such witness has so answered; and (b) an answer by a person to a question put by or before any Election Court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence, be in any proceeding, civil or criminal, admissible in evidence against him.⁵ The relief which the Court can give in respect of corrupt practices under s. 34 of the Representation of the People Act, 1918⁶ (expenses incurred by unauthorised persons), is limited to relief from the civil incapacities therein referred to, and does not extend to relief from criminal proceedings.

911. The proper time either to make application to be heard against being reported for a corrupt or illegal practice, or to apply for a certificate of indemnity, is when the Election Court has intimated its decision.⁷

¹ 15 & 16 Vict. c. 125, s. 15. ² 15 & 16 Vict. c. 57. ³ 46 & 47 Vict. c. 51, s. 38 (1).

⁴ *Ibid.*, s. 38 (2); *Caldecott v. Corrupt Practice Commissioners for Worcester*, 1907.

⁵ 46 & 47 Vict. c. 51, s. 59 (1).

⁶ 8 & 9 Geo. V. c. 64.

⁷ *Oxford*, 1924, 7 O'M. & H. 49, at p. 100.

An objection to a person not called at the trial making application for a certificate was repelled in *Berwick-upon-Tweed*.¹ The person having been called and examined and cross-examined by direction of the Court, a certificate was refused, and an opinion expressed as to the undesirability of giving a certificate to a person who is not called during the trial. The condition precedent to a person being entitled to a certificate that he must answer all questions put to him by the Election Court or the Election Commissioners "truly" has been held to mean that he must answer them truthfully. In *Oxford*,² in considering whether certificates should be granted to persons proved guilty of very serious and extensive corrupt and illegal practices, the opinion was expressed that "the only question we have to consider is whether the persons on whose behalf certificates are applied for have answered truly all the questions put." In the result all the certificates were granted. When the certificate is in terms other than that the person has made true answers to all questions he will not be protected.

SUBSECTION (29).—*Expenses.*

912. The expenses of the judges, including the expenses in providing a Court, are paid by the Treasury. The costs incurred by the Lord Advocate (including the remuneration of his representative) are paid by the Treasury.³ But the Court in their discretion may order all or any part of the said costs to be repaid to the Treasury by the parties to the petition, or such of them as they may direct.

913. The Election Court awards expenses to the parties as they may determine, and in so doing are (1) to disallow any costs, charges, or expenses caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and (2) to discourage needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether successful or unsuccessful.⁴ Where any costs are awarded in the course of the proceedings under the Corrupt Practices Act, the award of the same shall be held equivalent to a finding of expenses in the account thereof, subject to taxation by the Auditor of the Court of Session, and the taxed amount shall be decerned for by the election judge or by the Court.⁵ The costs of petitions and other proceedings under the Parliamentary Elections Act, 1868, or the 1883 Act shall, subject to any regulations which the Court of Session may make by Act of Sederunt, be taxed as nearly as possible according to the same principle as costs between agent and client are taxed in a cause in that Court, and the Auditor shall not allow any costs, charges, or expenses on a higher scale.⁶

914. In the *Dumfriesshire* case⁷ the Court held that in taxing an account of expenses in an election petition, the principle of taxation as

¹ 1923, 7 O'M. & H. 1, at p. 48.

³ 46 & 47 Vict. c. 51, ss. 43 (8) and 68 (3) (a).

⁴ 31 & 32 Vict. c. 125, s. 41.

⁶ 46 & 47 Vict. c. 51, s. 68 (17).

² 7 O'M. & H. 49, per Sankey J. at p. 99.

⁵ (a).

⁵ C.A.S., J, i. r. 34.

⁷ *Walker v. Waterlow*, 1869, 7 M. 751.

between agent and client was not necessarily the same when the unsuccessful party had to pay as when the client had to pay, and that the Auditor had done rightly in taxing off needless excessive charges, although these might have been allowed as between the agent and his client. The Court further held that the proper time to apply the general principles laid down in s. 41 of the Act regarding the modification of costs was after taxation of the account by the Auditor. This has also been the practice in England. Until recently, to avoid the expense involved in the Taxing Master having to make a detailed examination of every item in the account with reference to the election petition proceedings, the practice has been adopted of considering and allocating the costs at the same time as they are awarded. In *Berwick-upon-Tweed*¹ costs were awarded to the petitioner and the respondent ordered to pay eight-tenths of the taxed amount, and in *Oxford*,² where objection was taken to the costs being granted of witnesses not called—ten out of thirteen—on charges which had failed, the Court allowed nine-tenths of the taxed costs to the petitioner, but as far as the witnesses were concerned only allowed those witnesses who had been called, and no other witnesses.

915. In *Elgin and Nairn*,³ following the decisions in the *Dumfriesshire* case⁴ and the *Wigtown* (unreported) case, and the English practice, the Court held that the Auditor had rightly refused to allow to the respondent the fees of a third counsel, although the petitioner had himself employed three counsel. In *Greenock*,⁵ where the respondent was unseated on a recount, the petitioner did not ask for expenses, and an application by the respondent that the returning officer should be found liable to him in his expenses was refused by the Court.

SECTION 2.—LOCAL GOVERNMENT AND MUNICIPAL ELECTION PETITIONS.

SUBSECTION (1).—Introduction.

916. The aim of the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890,⁶ and General Rules made thereunder,⁷ is to secure the same freedom of and protection from general corruption, corrupt and illegal practices, and lavish expenditure at local government and municipal elections as is afforded at parliamentary elections by the Corrupt and Illegal Practices Prevention Act, 1883,⁸ which is the model upon which the statute is framed. The Act applies to any election to a corporate office, which means the office of county councillor, town councillor, parish councillor, or member of an educational authority.⁹

917. “Bribery,” “treating,” “undue influence,” and “personation” include respectively anything done before, at, after, or with respect to

¹ 1923, 7 O.M. & H. 1, at p. 47.

² 1924, 7 O.M. & H. 48, at p. 97.

³ *Hood v. Gordon*, 1896, 23 R. 675.

⁴ *Walker v. Waterlow*, 1869, 7 M. 753.

⁵ 1892, Day's El. Cas. 22.

⁶ 53 & 54 Vict. c. 55.

⁷ C.A.S., L, x.

⁸ 46 & 47 Vict. c. 51.

⁹ 1890 Act, s. 1.

an election under the Act, which, if done before, at, after, or with respect to a parliamentary election, would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation, as the case may be, under any Act for the time being in force with respect to parliamentary elections.¹ "Corrupt practice" means treating and undue influence as defined by the Corrupt and Illegal Practices Prevention Act, 1883,² and bribery and personation as defined by the enactments set forth in the First Schedule to the Act, and also aiding, abetting, counselling, and procuring the commission of the offence of personation. Illegal practices consist of (1) payments for (a) conveyance of voters to the poll, (b) exhibition of placards by voters, (c) committee rooms in excess of legal number allowed;³ (2) voting or inducing any person to vote at an election knowing that he or such person is prohibited from doing so;⁴ (3) knowingly publishing false statements of the withdrawal of another candidate;⁵ (4) corruptly inducing a candidate to retire;⁶ (5) paying for bands of music, torches, flags, banners, cockades, and other marks of distinction;⁷ (6) contracting with livery stablemen for conveyance of voters to and from the poll;⁸ (7) using or hiring as a committee room premises where food or drink of any kind are sold;⁹ and (8) issuing bills, placards, and posters without the printer's name and address thereon,¹⁰ and are made offences in almost the exact terms of the corresponding sections of the 1883 Act.¹¹

SUBSECTION (2).—*Maximum Expenditure allowed to a Candidate.*

918. The maximum expenditure a candidate can incur in the conduct or management of an election is the sum of £25, and if the number of electors entitled to vote for such candidate exceeds 500, an additional amount of twopence for each elector above the first 500 electors.¹² Where there are two or more joint candidates the maximum amount of expenses shall, for each of such joint candidates, be reduced by one-fourth, or if there are more than two joint candidates by one-third.¹³ A candidate cannot pay for more than one committee room if the number of electors is less than 2000, and one additional committee room for every 2000 electors or incomplete part of 2000 electors over and above the said 2000.¹⁴ He can only employ for payment a number of persons not exceeding two if the number of electors is less than 2000, and one additional person for every 1000 electors or incomplete part of 1000 electors over and above 2000, and such persons may be employed as clerks and messengers. He may also employ one polling agent in each polling station.¹⁵

¹ 1890 Act, s. 2.

² 46 & 47 Vict. c. 51.

³ Sec. 8 (1).

⁴ Sec. 10 (1).

⁵ Sec. 10 (2).

⁶ Sec. 15.

⁷ Sec. 16 (1).

⁸ Sec. 14 (1).

⁹ Sec. 20 (1).

¹⁰ Sec. 18.

¹¹ 46 & 47 Vict. c. 51, ss. 7, 9, 15, 16 (1), 14 (1), 18, 20.

¹² 1890 Act, s. 9 (1), amended by 9 Geo. 5, c. 13, s. 1.

¹³ *Ibid.*, s. 9 (2).

¹⁴ *Ibid.*, s. 8 (1) (c).

¹⁵ *Ibid.*, s. 17 (1).

SUBSECTION (3).—*Claims and Payments for Election Expenses and Declaration.*

919. There is no obligation on a candidate to appoint an election agent as in a parliamentary election, but the statute proceeds on the assumption that one is appointed. It is not illegal for a candidate to arrange for the gratuitous services of an agent.¹

920. Every claim against a person in respect of any expenses incurred by or on behalf of a candidate at an election on account or in respect of the conduct or management of such election must be sent in within fourteen days after the day of election, and if not so sent in shall be barred and not paid, and all expenses incurred must be paid within twenty-one days after the day of election, and not otherwise. Any person who makes a payment in contravention of this enactment, except where such payment is allowed as provided for by the Act, is guilty of an illegal practice, but if the payment is made without the sanction or connivance of the candidate his election shall not be void, nor shall he be subject to any incapacity under the Act by reason only of such payments having been made in contravention thereof.²

921. Every agent of a candidate must, within twenty-three days after the day of election, make a return to the candidate in writing of all expenses incurred by such agent on account of or in respect of the conduct or management of such election, and if he fails so to do he shall be liable on summary conviction to a fine not exceeding £50.³

922. Within twenty-eight days after the day of an election the candidate must send to the prescribed officer a return of all expenses incurred by him or his agents, vouched (except in the case of sums under twenty shillings) by bills stating the particulars and receipts, and accompanied by a declaration by the candidate made before a justice of the peace in the form set forth in the Second Schedule to the Act, or to the like effect.⁴ The returns and declarations are to be sent in the case of county council elections, and of parish council elections for a landward parish or for the landward part of a parish partly landward and partly burghal, to the county clerk of the county within which such elections are held; in the case of municipal elections, and of parish council elections for a burghal parish or for the burghal part of a parish partly landward and partly burghal, or for parishes or parts of parishes co-extensive with police burghs or parts thereof, to the clerk of the burgh within which such elections are held; and in the case of education authority elections to the clerk or other person acting as the principal executive officer to the education authority.⁵

923. After the expiration of the time for making such return and declaration the candidate, if elected, shall not until he has made the return and declaration respecting election expenses, or until the date of the allowance of such authorised excuse as is prescribed in the Act,

¹ *M'Laren v. Fife*, 1892, 8. S.L. Rev. 103.

³ *Ibid.*, s. 25 (2).

⁴ *Ibid.*, s. 25 (3).

² 1890 Act, s. 25 (1).

⁵ C.A.S., L. x. 19.

sit or vote in respect of any corporate office to which he has been elected as aforesaid, and if he does so, he shall forfeit £50 for every day on which he so sits or votes to any person who sues for the same.¹ If the candidate, without authorised excuse, fails to render the return and declaration he is guilty of an illegal practice, and if he knowingly makes the declaration falsely he is guilty of an offence and on conviction is liable to the punishment for wilful and corrupt perjury, and the offence shall also be deemed to be a corrupt practice.²

924. The Election Court for the county in which the election was held may on application either of the candidate or a creditor allow any claim to be sent in and any expenses to be paid after the prescribed time.³ The decision in *Rae, Petr.*,⁴ where relief was granted under this subsection on the ground of "inadvertence" caused through the candidate and his election agent having no knowledge of the requirements of the election statutes, must now be held to be overruled.⁵

925. If the candidate applies to the Election Court and shews that the failure to make the return and declaration, or either of them, or any error or false statement therein, has arisen by reason of his illness or absence, or of the absence, death, illness, or misconduct of any agent, clerk, or officer, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, the Court may after such notice of the application and on production of such evidence of the grounds stated in the application, and of the good faith of the applicant, and otherwise as to the Court seems fit, make such order for allowing the authorised excuse for the failure to make such return and declaration, or for an error or false statement in such return or declaration as to the Court seems fit.⁶ The force and effect of this section is considered under the corresponding section in almost identical terms in the 1883 Act.⁷

SUBSECTION (4).—*Grounds of Petition.*

926. An election may be questioned on the ground—

- (a) that the election was wholly avoided by general bribery, treating, undue influence, or personation; or
- (b) that the election was avoided by corrupt or illegal practices; or
- (c) that the person whose election is questioned was at the time of the election disqualified; or
- (d) that he was not duly elected by a majority of lawful votes.⁸

These grounds are considered under the appropriate heads in relation to a parliamentary election petition.⁹ An election shall not be questioned on any of those grounds by way of reduction or suspension, or by any form of proceeding except by an election petition.¹⁰ The exclusive jurisdiction is limited to elections challenged on grounds falling

¹ 1890 Act, s. 25 (4).

² *Ibid.*, s. 25 (5).

³ *Ibid.*, s. 25 (6).

⁴ 1913, 29 S.L. Rev. 174.

⁵ See para. 740, *supra*.

⁶ 1890 Act, s. 25 (9).

⁷ See para. 899, *supra*.

⁸ 1890 Act, s. 30 (1).

⁹ See para. 763, *et seq.*, *supra*.

¹⁰ 1890 Act, s. 30 (2).

under one of the four specified heads and does not exclude the jurisdiction of the Court of Session in an action of reduction of an election based on grounds other than any included in those specified.¹

SUBSECTION (5).—*Who may Petition and Presentation of Petition.*

927. A petition may be presented (1) by four or more persons who voted or had a right to vote at the election; or (2) by a person alleging himself to have been a candidate at the election.² The petition must be in the form of an initial writ under the Sheriff Courts Act, 1907, and signed by the petitioner or petitioners.³ Failure to sign the petition is fatal to its validity. The petitioner's agent's signature is not sufficient.⁴ The petition must be lodged with the sheriff-clerk of the county in which the election has taken place or, where an electoral area is situate in more than one county, with the sheriff-clerk in the county to which the larger part of such electoral area belongs.² The times within which a petition may be presented are the same as in the case of a parliamentary election.⁵

928. Any election petition presented within the time limited by the enactment may, for the purpose of including an allegation of an illegal practice, be amended with the leave of the Court within the time within which a petition complaining of the election on the ground of that illegal practice can be presented.⁶ The foresaid provisions respecting the time for presenting or amending an election petition on the ground of an illegal practice shall apply notwithstanding that the illegal practice is also a corrupt practice.⁷ The sheriff-clerk, on the petition being lodged with him, must without delay transmit it to the Sheriff, and the Sheriff must forthwith pronounce a deliverance fixing the amount of the security to be given by the petitioner and, if he thinks proper, appointing answers within a specified time after service.³

SUBSECTION (6).—*Security for Costs.*

929. At the time of presenting the petition, which is held to be the date of the first deliverance thereon by the Sheriff, or within three days afterwards, the petitioner must give security for all charges and expenses which may become payable by him to any witness summoned on his behalf or to any respondent.⁸ The security may be either by a deposit of money or by finding caution, or partly in one way and partly in the other to such amount, not exceeding £500, as the Election Court directs.⁹

¹ *Kerr v. Hood*, 1907 S.C. 895; *Hodge v. Ballingry School Board*, 1897, 35 S.L.R. 634; 5 S.L.T. 153.

² 1890 Act, s. 31.

⁴ *Baxter v. Stevenson*, 1914, 30 Sh. Ct. Rep. 159.

⁵ 1890 Act, s. 32; see para. 840, *supra*.

⁶ 1890 Act, s. 32 (2).

⁸ *Ibid.*, s. 33 (1); C.A.S., L, x. 1.

³ C.A.S., L, x. 1.

⁷ *Ibid.*, s. 32 (3).

⁹ 53 & 54 Vict. c. 55, s. 3 (2).

930. Within five days after the presentation of the petition the petitioner shall serve upon the respondent, either personally or by a registered letter sent to his home address and posted in time to admit of its being delivered in ordinary course of post within said five days, a notice of the presentation of the petition and of the nature of the proposed security and a copy of the petition.¹ Failure to serve the statutory notices will vitiate the petition.² Within five days after the service of the notice the respondent may object in writing to any bond of caution on the ground that any cautioner is insufficient or is dead or cannot be found or ascertained for want of a sufficient description in the bond, or that the bond has not been duly executed by any cautioner.³

931. If the security proposed be in whole or in part by bond of caution it is given by lodging with the sheriff-clerk a bond for the amount specified in the Sheriff's deliverance. The sufficiency of the cautioner or cautioners must be attested, to the satisfaction of the sheriff-clerk as in the case of judicial bonds of caution.⁴ Objection to a bond of caution must be lodged with, heard, and disposed of by the sheriff-clerk, and if any objection is allowed it may be removed by a deposit of such sum as the sheriff-clerk shall determine and within five days after the date of the sheriff-clerk's deliverance allowing the objection.⁴ If the security in whole or in part tendered is in money, the deposit shall be made in a bank selected by the sheriff-clerk in the joint names of the petitioner and the sheriff-clerk and shall be handed to and held by the sheriff-clerk subject to the orders of the Court in the petition.⁴

SUBSECTION (7).—*Respondents.*

932. The person whose return is petitioned against and the returning officer are the only persons who can be made respondents. Two or more candidates may be made respondents to the same petition and their cases may be tried at the same time, but the petition shall be deemed to be a separate petition against each respondent.⁵ Where more petitions than one are presented relating to the same election they must be tried together.⁶

SUBSECTION (8).—*Amendment of Pleadings.*

933. The Sheriff has power at any stage to allow the petition to be amended upon such conditions as to expenses or otherwise as he thinks just, provided that no amendment altering the ground upon which the election was questioned in the petition as presented shall be competent except to the extent sanctioned by s. 2 (2) of the Act. The proviso is to prevent a new charge being added after the time for doing so has expired.⁷

¹ 53 & 54 Vict. c. 55., s. 3 (3).

² *Hunter v. Kennedy*, 1896, 12 Sh. Ct. Rep. 95; *Baxter v. Stevenson*, 1913, 30 Sh. Ct. Rep. 159.

³ 53 & 54 Vict. c. 55, s. 3 (4).

⁵ 1890 Act, s. 34 (1).

⁶ *Ibid.*, s. 34 (2).

⁴ C.A.S., I, x. 2.

⁷ C.A.S., I, x. 3.

SUBSECTION (9).—*Constitution of Election Court.*

934. The election petition and all proceedings incidental to and consequent thereon, except as thereafter provided, must be tried by the Sheriff (excluding Sheriff-Substitutes) of the county within which the challenged election took place.¹ The Election Court has the same powers and privileges as a judge on the trial of a parliamentary election petition, except that any fine or order of committal by the Court may, on securing application by the person aggrieved, be discharged or varied by either of the divisions of the Court of Session or in vacation by the Lord Ordinary on the Bills on such terms, if any, as the Court of Session or Lord Ordinary on the Bills may think fit.² Any proceedings incidental to or consequent upon an election or election petition under ss. 25 (allowing excuse for failure to lodge return and declaration of expenses), 32 (presentation of petition after 21 days), 33 (security), 39 (abatement), and 40 (withdrawal of petition) may be heard and disposed of by the Sheriff-Substitute.³ The sheriff-clerk is the clerk of the Court.⁴ A shorthand writer shall attend at the trial and shall be sworn by the Court faithfully and truly to take down the evidence given at the trial. He shall take down the evidence at length.⁵ His charges as fixed by the Sheriff shall in the first instance be defrayed by the petitioner.⁶ The Lord Advocate is represented by one of his Deputies or the Procurator-Fiscal at the trial.⁷

SUBSECTION (10).—*Leave to Withdraw and Substitution of Petitioner.*

935. A petitioner cannot withdraw a petition without the special leave of the Court. Application for leave to withdraw must be made by minute to the Court as nearly as may be in the form of Schedule A annexed to the Regulations, and must be preceded by written notice of the intention to make it, sent through the post to (1) the respondent, (2) His Majesty's Advocate, and (3) the returning officer; and the returning officer must publish the fact of his having received such a notice in the area for which the election questioned was held. The Sheriff, upon the application being laid before him, must by interlocutor fix the time—not being earlier than eight days after the date of the interlocutor—and place for hearing it, and the petitioner shall, at least six days before the day fixed for the hearing, publish in a newspaper circulating in the district named in the interlocutor a notice as nearly as may be in the form of Schedule B annexed to the Regulations.⁸ At the hearing of the application any person who might have been a petitioner in respect of the election may apply to the Court to be substituted as a petitioner, and the Court may if it thinks fit substitute him accordingly.⁹

¹ 1890 Act, s. 35 (1).² *Ibid.*, s. 35 (2).³ *Ibid.*, s. 35 (3).⁴ C.A.S., L, x. 5.⁵ 1890 Act, s. 36 (12).⁶ C.A.S., L, x. 6.⁷ 53 & 54 Vict. c. 55, s. 41 (1).⁸ 1890 Act, s. 38 (1); C.A.S., L, x. 11.⁹ 1890 Act, s. 38 (3).

936. Before leave to withdraw is granted, affidavits by all the parties to the petition and their agents that no corrupt bargain has been entered into must be produced, unless on special cause shewn these are dispensed with by the Court.¹ Copies of the affidavits must be sent to His Majesty's Advocate, and the Court may hear him or one of his Deputes or the Procurator-Fiscal in opposition to the withdrawal.² If the Court is of opinion that the proposed withdrawal is induced by any corrupt bargain or is the result of any prohibited agreement, terms, or undertaking the Court may order the original security to remain as security for a substituted petitioner.³ No petition may be withdrawn without the consent of all the petitioners.⁴ If a petition is withdrawn the petitioner is liable to pay the costs of the respondent.⁵

SUBSECTION (11).—*Abatement of Petition.*

937. In the event of the death of the sole petitioner, or of the survivor of several petitioners, the sheriff-clerk shall, upon the fact being brought to his knowledge, insert in a newspaper circulating in the district a notice as nearly as may be in the form of Schedule C to the Regulations, and the time within which any person who might have been a petitioner in respect of the election may apply to the Court to be substituted as a petitioner shall be twenty-one days from the publication of such notice.⁶ Any person who might have been a petitioner in respect of the election may be substituted by the Court as petitioner and must give security as in the case of a new petition.⁷ The abatement of a petition does not affect the liability of the petitioner or of any other person to the payment of costs previously incurred.⁸

SUBSECTION (12).—*Trial of Petition.*

938. An election petition shall be tried in open Court within the Sheriff Court, unless the Election Court on being satisfied on special circumstances shewn appoints some other convenient place within the sheriffdom for trial. The trial shall so far as is practicable be continued *de die in diem* on every lawful day until its conclusion, but the Election Court may in its discretion adjourn the trial from time to time and from any one place to any other place within the sheriffdom. A notice of the time and place fixed by the Sheriff for the trial must, as soon as the interlocutor of the Sheriff fixing these is received, be fixed by the sheriff-clerk to the notice board at his principal office, and he must, not less than seven days before the day appointed for the trial, send by post copies of such notice to (1) the petitioner, (2) the respondent, (3) His Majesty's Advocate, and (4) the returning officer, and the returning officer shall forthwith publish the same in the area for which the election questioned was held. The affixing of the notice on the

¹ 1890 Act, s. 38 (4).

² *Ibid.*, s. 38 (8).

³ *Ibid.*, s. 38 (9).

⁴ *Ibid.*, s. 38 (13).

⁵ *Ibid.*, s. 38 (12).

⁶ C.A.S., L, x. 12.

⁷ 1890 Act, s. 39 (3).

⁸ *Ibid.*, s. 39 (2).

notice board at the sheriff-clerk's office is to be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of or relating to any of the copies thereof, provided always that at any time before the trial any party interested may bring the matter before the Sheriff.¹

SUBSECTION (13).—*List of Votes objected to and of Objections.*

939. When a petitioner claims the seat for an unsuccessful candidate, alleging that such candidate had a majority of lawful votes, he and the respondent must respectively deliver to the sheriff-clerk and send through the post to the other party a list of the votes intended to be objected to, and of the objection to each such vote, and the sheriff-clerk shall allow inspection of such lists to all concerned. No evidence is allowed to be given against any vote or in respect of any objection not specified in the list except by leave of the Court, granted upon such terms as to amendment of the list, postponement of the trial, and payment of costs as to him may seem just.²

SUBSECTION (14).—*Petition against Undue Return.*

940. Where on the trial of a petition complaining of an undue return and claiming the office for some person the respondent intends to give evidence to prove that that person was not duly elected, such respondent must, five days before the day appointed for the trial, deliver to the sheriff-clerk and send through the post to the petitioner a list of the objections to the election upon which he intends to rely, and no further evidence shall be allowed except upon similar conditions to the previous mentioned case.³

SUBSECTION (15).—*Notice by Respondent that he does not oppose Petition.*

941. A respondent who does not intend to oppose a petition must give notice by leaving a written notice to that effect at the office of the sheriff-clerk at least six days (exclusive of the day of leaving such notice) before the day fixed for the trial; and upon such notice being left with the sheriff-clerk or upon its being brought to his knowledge that a respondent other than a returning officer has died, resigned, or otherwise ceased to hold the office to which the petition relates, he shall forthwith advertise the fact once in a newspaper circulating in the district and shall also send intimation thereof by post to (1) the petitioner, (2) His Majesty's Advocate, and (3) the returning officer, who shall publish the fact in the district.⁴ The advertisement by the sheriff-clerk shall state that anyone desirous to be admitted as respondent must lodge his application within ten days of the publication of the advertisement.⁵ Any person who might have been a petitioner may

¹ 1890 Act, s. 36.

² C.A.S., L, x. 8.

³ C.A.S., L, x. 9.

⁴ C.A.S., L, x. 13.

⁵ C.A.S., L, x. 14.

apply to be admitted as a respondent to oppose the petition and shall be admitted accordingly, except that the number of persons so admitted shall not exceed three. A respondent who has given the prescribed notice that he does not intend to oppose the petition shall not be allowed to appear as a party against the petition in any proceedings thereon.¹

SUBSECTION (16).—*Witnesses.*

942. The Election Court may by order in writing require any person who appears to have been concerned in the election to attend as a witness. Any person refusing to obey the order shall be guilty of contempt of Court. The Court may examine any person so required to attend, or being in Court, although he is not called and examined by any party to the petition. A witness may, after his examination by the Court, be cross-examined by or on behalf of the petitioner and respondent, or either of them.² The expenses allowed to witnesses are according to the scale allowed to witnesses in a civil cause.³ The sum to be paid to a witness for his attendance at the trial is certified by the sheriff-clerk, and in the first instance is paid by the party adducing the witness.⁴

SUBSECTION (17).—*Determination of the Court.*

943. At the conclusion of the trial, the Court must determine (1) whether the person whose election is complained of was duly elected; or (2) whether any other person was duly elected in his place; or (3) whether the election was void. The determination is final to all intents as to the matters at issue on the petition.⁵

944. If a charge is made of corrupt or illegal practices, the Court must determine (1) whether any corrupt practice was committed with the knowledge of the candidate, and the nature of the corrupt practice; (2) whether any of the candidates at the election has been guilty by his agents of corrupt practices in reference to such election;⁶ (3) the names of all persons proved guilty of any corrupt practice;⁷ (4) whether any corrupt practices have, or whether there is reason to believe that any corrupt practices have, extensively prevailed at the election;⁸ (5) whether any candidate by himself, or his agents, has been guilty of an illegal practice;⁹ (6) whether illegal practices prevailed so extensively as to affect the result.¹⁰ Persons appearing to the Court to be guilty of the offence of a corrupt or illegal practice are given an opportunity of being heard in their defence.¹¹

SUBSECTION (18).—*Special Case.*

945. Any party to an election petition may by minute apply to the Election Court to state a special case to the Court of Session. If on

¹ 1890 Act, s. 40.

² *Ibid.*, s. 31.

³ *Ibid.*, s. 37 (4).

⁴ C.A.S., L, x. 10.

⁵ 1890 Act, s. 36 (5).

⁶ *Ibid.*, s. 4.

⁷ *Ibid.*, ss. 6, 42.

⁸ *Ibid.*, s. 5.

⁹ *Ibid.*, s. 12.

¹⁰ *Ibid.*, s. 36 (6).

¹¹ *Ibid.*, s. 42 (4).

such an application it appears to the Election Court that the case raised by the petition can be conveniently stated as a special case, the said Court may direct the same to be stated accordingly, and any such special case shall be heard before the Court of Session, and the decision of the Court of Session shall be final.¹ If it appears to the Election Court at the trial that any question of law requires consideration by the Court of Session, the Election Court may reserve any such question and submit the same to the Court of Session, who may make such order for the discussion of the question as they think expedient, and thereafter decide the same.

SUBSECTION (19).—*Relief.*

946. Relief may be had for the consequences of an illegal act (not bribery or personation) under ss. 23, 24, and 25 of the Act of 1890. The circumstances under which relief is granted in these elections are very similar to the circumstances in parliamentary elections.² Applications under ss. 23 and 24 are competent only to the Sheriff;³ under s. 25, for an authorised excuse for failure to lodge return and declaration of expenses, they may be made to the Sheriff-Substitute.⁴

SUBSECTION (20).—*Prosecution of Offenders.*

947. At the trial, the Lord Advocate is represented by one of his Deputes or by the fiscal. If the Sheriff grants warrant for the apprehension of, or commits, any person suspected of being guilty of a corrupt or illegal practice, a report shall be made to the Lord Advocate, that such person may be tried as he may direct. All offences under the 1890 Act are prosecuted at the instance of the Lord Advocate, and, if tried in the Sheriff Court are tried by the Sheriff, and not the Sheriff-Substitute.⁵ Subject to the provisions of the Act of 1890, the procedure for the prosecution of offenders, including the grant to a witness of a certificate of indemnity, shall be the same as if the offence had been committed in reference to a parliamentary election.⁶

SUBSECTION (21).—*Expenses.*

948. The Election Court determines the question of expenses between the parties. The Court may award expenses against either the petitioner or the respondent for any needless expense incurred by vexatious conduct, unfounded allegations, or unfounded objections made in the proceedings, irrespective of whether they are or are not on the whole successful.⁷ The expenses are taxed by the Auditor of the Sheriff Court upon the second or higher scale in the table of fees sanctioned by the Act of Sederunt of 4th December 1898, unless the Sheriff otherwise directs.⁸

¹ 1890 Act, s. 36 (7); C.A.S., L, x. 7.

² See para. 898 *et seq.*, *supra*.

³ 1890 Act, s. 35 (1).

⁴ *Ibid.*, s. 35 (3). See *Fletcher v. Registration Officer of Airdrie*, 1923 S.L.T. (Sh. Ct.) 13.

⁵ 1890 Act, s. 41.

⁶ *Ibid.*, s. 49.

⁷ *Ibid.*, s. 42.

⁸ C.A.S., L, x. 19.

949. If a petitioner neglects or refuses for three months after demand to pay to any witness adduced by him or the respondent their fees as certified by the sheriff-clerk, or any sum certified to be due to the respondent for his charges and expenses, and the neglect or refusal is, within one year after the demand, proved to the satisfaction of the Election Court, the sheriff-clerk shall thereon certify that the conditions in the bond of caution have not been fulfilled, and it shall then be competent for the party or parties interested to register the bond and do diligence upon it.¹

950. Where the Court finds it not proved that a corrupt practice had been committed with the knowledge and consent of the respondent, and that the respondent took all reasonable means to prevent corrupt practices being committed on his behalf, the Court may in the exercise of their discretion order the whole or a part of the expense of the petition to be paid by (a) the county, burgh, parish council, or education authority of the area if the Court are of opinion that corrupt practices extensively prevailed; or (b) any person or persons in the opinion of the Court proved to have been extensively engaged in encouraging or promoting extensive corrupt practices at the election, after giving such person or persons an opportunity of being heard by counsel or agents and leading evidence against any order being made or the proportion in which the costs should be allocated and recovered from the respective parties.² The Court on cause shewn may grant relief to any person who appears to them to have been guilty of a corrupt or illegal practice from any order for payment of the expenses of the election proceedings.³

951. Any expenses of an election petition to be paid under an order of the Court by a county, burgh, education authority, or parish council shall be paid out of the general purposes rate, registration of voters assessment, or police assessment, school rate, or poor rate, as the case may be. Where the police assessment which can be levied in any burgh is limited, an addition to that assessment may be levied for the purpose of paying such expenses.⁴

952. The travelling and other expenses of the Sheriff incurred in an election petition are paid by the county, burgh, education authority, or parish council, as the case may be, out of the same rate of assessment as is specified in subsec. 5 of s. 42 of the Act. The Court may order repayment of such expenses to the county or other body by the parties to the petition in such proportions as shall to the Court seem proper, and upon such order being pronounced the sums due shall form a debt due from such parties, and may be recovered accordingly.⁵

953. The cost of publishing any matter requiring to be published by the returning officer or by the sheriff-clerk shall in the first instance be paid by the person moving in the matter, and shall form part of the general costs of the election petition. The sheriff-clerk shall be allowed

¹ 1890 Act, s. 42 (2); C.A.S., L, x, 10.

² 1890 Act, s. 42 (3).

³ *Ibid.*, s. 42 (4).

⁴ *Ibid.*, s. 42 (5).

⁵ *Ibid.*, s. 43.

as part of the general costs of the petition a fee of two shillings for each copy of a notice or intimation sent, and for drawing each newspaper advertisement published by him.¹

SUBSECTION (22).—*Civil Action for Penalties.*

954. An elected candidate may not, until he has made the return and declaration respecting election expenses, or until the date of the allowance of an authorised excuse, sit or vote in respect of the corporate office to which he has been elected. If he does so, he shall forfeit £50 for every day on which he sits and votes to any person who sues for it.²

¹ C.A.S., L, x. 17.

² 1890 Act, s. 25 (4).

FRAUD.

See MISREPRESENTATION AND FRAUD.

FRAUD (CRIMINAL). FRAUDULENT BANKRUPTCY.

See CRIME.

FRAUDULENT ENLISTMENT.

See ARMED FORCES OF THE CROWN.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY.

FREEHOLDER.

See FRANCHISE.

FREIGHT.

See AVERAGE; CARRIAGE BY SEA; INSURANCE
(MARINE); RAILWAYS AND CANALS.

FRIENDLY SOCIETIES.

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SECTION 1.—HISTORY OF LEGISLATION.

955. Although voluntary associations for the purposes of mutual relief and benefit have existed in various forms in this country for many centuries, no attempt was made to regulate them by statute until towards the end of the eighteenth century. The first Act was passed

GENERAL AUTHORITIES.—Fuller on Friendly Societies, 4th ed. ; Diprose's Reports of Law Cases affecting Friendly Societies ; Davis on Friendly Societies ; Tidd Pratt, Law of Friendly Societies, 14th ed., ed. Brabrook.

in 1793,¹ its purpose being for the "Encouragement and Relief of Friendly Societies." By this Act certain privileges and benefits were conferred on societies which brought themselves within the Act, the main requisite being that they should have their rules confirmed by justices; and though these privileges have been changed and modified by subsequent statutes,² the principle which underlies them has been continued to the present time. This Act was amended and extended on various occasions, until in 1829 it was repealed, the law reconstructed, and the method was introduced of requiring the rules to be certified by a duly appointed barrister,³ styled later⁴ the Registrar of Friendly Societies. In 1850 the law relating to friendly societies was again consolidated and amended.⁵

956. In 1855 all previous statutes were repealed, and the law was once more consolidated and changed. Some of the benefits were extended to certain other classes of societies, and the distinction between "certified" and "registered" societies created in 1850 was abolished.⁶ Though afterwards amended in several particulars, this continued to be the principal Act until, as the outcome of a Royal Commission on Friendly Societies, which sat from 1870 to 1874, a new Act was passed in 1875. By it all the former statutes were repealed, the law consolidated, and further provisions introduced.⁷ Various amendments were made in subsequent years, the last being in 1895, and these were authorised to be inserted and printed with the principal Act of 1875.⁸

957. By the Friendly Societies Act, 1896,⁹ the law was once more consolidated and the previous Acts were repealed. At the same time the societies known as Collecting Societies and Industrial Assurance Companies, which had come under special provisions in the previous Act, were treated under a special statute called the Collecting Societies and Industrial Assurance Companies Act, 1896.¹⁰ By the Friendly Societies Act, 1908,¹¹ certain amendments were made, and these were ordered to be incorporated in all future copies of the Act of 1896. This amending Act and the principal Act may be cited together as the Friendly Societies Acts, 1896 and 1908.¹² The amendments so made will be noted by a reference to the section of the 1908 Act. Otherwise, where sections only are noted, these refer to the 1896 Act. Among the subjects dealt with by these amendments are: (1) admission of minors of any age; (2) raising the limits of the benefits of members;

¹ 33 Geo. III. c. 54.

² 35 Geo. III. c. 111; 49 Geo. III. c. 125; 59 Geo. III. c. 128.

³ 10 Geo. IV. c. 56, amended by 4 & 5 Will. IV. c. 40, and 3 & 4 Vict. c. 73.

⁴ 9 & 10 Vict. c. 27.

⁵ 13 & 14 Vict. 115, amended by 15 & 16 Vict. c. 31; 16 & 17 Vict. c. 123, and 17 & 18 Vict. c. 56.

⁶ 18 & 19 Vict. c. 63.

⁷ 38 & 39 Vict. c. 60.

⁸ 42 Vict. c. 9; 45 & 46 Vict. c. 35; 48 & 49 Vict. c. 27; 50 & 51 Vict. c. 56; 52 & 53 Vict. c. 22; 56 & 57 Vict. c. 30; 58 & 59 Vict. c. 26.

⁹ 59 & 60 Vict. c. 25.

¹⁰ 59 & 60 Vict. c. 26.

¹¹ 8 Edw. VII. c. 32.

¹² 1908 Act, s. 14.

(3) enlarging the power of investments; (4) determination of disputes; (5) award and recovery of costs; (6) service of legal process.

958. Following upon a report by a committee appointed by the Board of Trade to inquire into the business carried on by collecting societies and industrial assurance companies, there was passed the Industrial Assurance Act, 1923.¹ Among its provisions were the repeal of the Collecting Societies and Industrial Assurance Companies Act, 1896, and the creation, in place of the Chief Registrar, of an Industrial Assurances Commissioner with fuller and wider powers in connection with industrial assurance business carried on by these societies. A slight defect necessitated the passing of the Friendly Societies Act, 1924,² which also made a small amendment in the principal Act of 1896.

959. Other enactments since 1896 affecting Friendly Societies are:

(1) The Societies' Borrowing Powers Act, 1898,³ which gives power to a "society" to provide by rule that it may receive deposits and borrow money at interest from its members, or from other persons. The rule on being registered is valid. "Society" means a specially authorised society registered, or seeking registration, under the Friendly Societies Act, 1896, having for its object the creation of funds to be lent out to the members of the society or for their benefit, and having in its rules provisions (a) that no part of its funds shall be divided by way of profit, bonus, dividend, or otherwise among its members; and (b) that all money lent to members shall be applied to such purpose as the society or its committee of management may approve.

(2) The Shop Clubs Act, 1902,⁴ which authorises the registration of societies the membership in which was compulsory as a condition of employment. This Act appears to be almost a dead letter.

SECTION 2.—REGISTRATION.

SUBSECTION (1).—*Societies that may be Registered.*

960. The societies that may be registered under the 1896 Act are divided into five classes, distinct from each other.⁵ These are—(i) Friendly Societies; (ii) Cattle Insurance Societies; (iii) Benevolent Societies; (iv) Working Men's Clubs; (v) Specially authorised Societies. A society coming under one of these classes is, on registration, entitled to the privileges and subject to the provisions of the Act. In some matters special provisions are made to apply to one or other of these classes, but with these exceptions the provisions apply generally to all.

(i) *Friendly Societies.*

961. The societies embraced under the first class, "Friendly Societies," are societies for the purpose of providing by voluntary

¹ 13 & 14 Geo. V. c. 8.

² 14 & 15 Geo. V. c. 11.

³ 61 & 62 Vict. c. 15.

⁴ 2 Edw. VII. c. 21.

⁵ Sec. 8.

subscriptions of the members, with or without the aid of donations, for—

- (a) Relief of members and their relatives during sickness or other infirmity, bodily or mental, in old age (meaning any age after fifty) or widowhood, or of orphans of members during minority. Formerly it was a question whether insanity was included, but the addition of the words “or mental” removes any doubt.
- (b) Insuring money for certain payments on birth of a member's child, or on the death of a member, or of the husband, wife, or child of a member.
- (c) Relief of members when in search of employment, or in distress, or in cases of shipwreck, or loss or damage of or to boats or nets.
- (d) Endowment of members or their nominees at any age.
- (e) Insurance against fire to a sum not exceeding £15 of implements of trade.
- (f) Guaranteeing the performance of their duties by officers and servants of the society or any branch thereof.¹

No society insuring for an annuity over £50, or a greater gross sum than £200, can be registered under the Act.

962. Societies formed for such purposes may be constituted as—

- (1) Societies having branches.²
- (2) Dividing Societies, *i.e.* having a periodical division of funds.³
- (3) Deposit Friendly Societies, which provide for accumulating the surplus of a member's contributions for his own use.⁴

In order to bring a society within the Act, it is not necessary that it should include all the objects stated, provided these are substantially the same.⁵ Married women may be members,⁶ as well as minors;⁷ members need not now be over one year of age.⁸ The Act provides for the existence of societies consisting wholly of minors, and the amalgamation of such juvenile societies with adult societies.⁹ It further contemplates the existence of honorary members, and their consent is necessary in the event of dissolution.¹⁰

(ii) *Cattle Insurance Societies.*

963. Under previous Acts only certain named animals could be insured against. This restriction is now removed. Insurance is only competent in case of loss by death, but the amount is unlimited.¹¹ This class of societies, as well as Benevolent Societies, Working Men's Clubs, and specially authorised societies, unless directed to the contrary, are exempted from making the quinquennial valuation and return.¹² Money

¹ This purpose was added by 1908 Act, s. 1.

² Sec. 17.

³ Sec. 15.

⁴ Sec. 42.

⁵ *Knowles v. Booth*, 1883, 32 W.R. 432.

⁶ Sec. 8 (1).

⁷ Sec. 36.

⁸ 1908 Act, s. 2.

⁹ Sec. 70 (5).

¹⁰ Sec. 78.

¹¹ Sec. 8 (2).

¹² Sec. 28 (4).

payable by members of Cattle Insurance Societies to the society (or to a branch) is recoverable as a debt in a Court of law.¹

(iii) *Benevolent Societies.*

964. The third class consists of societies for any benevolent or charitable purpose.—This means societies established for the purpose of providing benefits for persons other than the members, their wives, or relatives. Such a society must be for a particular and not for general purposes of benevolence. It cannot hold land exceeding one acre,² or be registered with a rule for division of its funds.³ Members of these societies or of Working Men's Clubs have not the power of nomination of a person to receive a sum of money not exceeding £100 payable on such member's death.⁴

(iv) *Working Men's Clubs.*

965. These are societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation. A society for any one of these purposes may be registered, but the rules must shew that the society is intended for working men. Such societies have, as stated above, no power of nomination, but are exempt from valuation. If they hold premises in which intoxicating liquors are sold they come within the provisions of the Licensing Acts and must be registered.

(v) *Specially authorised Societies.*

966. Societies for any purpose which the Treasury may authorise as a purpose to which the provisions of the Act ought to be extended may be registered under the Act. In their case the Treasury may limit the application of the Act to them to such provisions as are stated in the authority, but such limitations must be stated in the rules of the society. Societies so authorised do not require to be registered under the Companies Act, 1862.⁵ Reference is made to a list of the special purposes authorised by the Treasury, and still in force.⁶

SUBSECTION (2).—*The Registry Office.*

967. The registry office of societies throughout the United Kingdom is under the direction of one chief registrar and assistant registrars for England, Scotland, and Ireland respectively.⁷ They are appointed by, and hold their office during the pleasure of the Treasury. The qualification for Scotland is an advocate, writer to the signet, or solicitor of

¹ Sec. 31. As to rights of members, see *Salmon v. Quin & Axtens*, [1909] 1 Ch. 311, 318; *Hickman v. Kent and Romney Marsh Sheepbreeders' Association*, [1915] 1 Ch. 881.

² Sec. 47 (3).

³ Sec. 15.

⁴ Sec. 56 (1).

⁵ *Peat v. Fowler*, 1886, 55 L.J. Q.B. 271.

⁶ Fuller's Law of Friendly Societies, 4th ed., p. 28.

⁷ Sec. 1, and Friendly Societies Act, 1924 (14 & 15 Geo. V. c. 11), s. 1.

not less than seven years' standing. The functions, duties, and powers of the central office and the assistant registrars for Scotland and Ireland respectively are set forth in the Act.¹ A yearly report is made to Parliament by the chief registrar, and these reports may be consulted for much useful information.² The salaries and expenses of the registry office are paid by the Treasury out of money provided by Parliament.³ The Treasury has power to fix a scale of fees,⁴ to appoint public auditors,⁵ and to make regulations respecting registry and procedure, and generally for carrying the Act into effect.⁶ The chief registrar has also duties of registration, supervision, and control over schemes of Workmen's Compensation; schemes for Shop Clubs; and over Building Societies, Industrial and Provident Societies, Loan Societies, Savings Banks, Scientific and Literary Societies, and Trade Unions. Where societies are registered and their business is confined to Scotland, the assistant registrar for Scotland has certain discretionary powers, in addition to such as the chief registrar may delegate to him. These include (a) approval of change of name;⁷ (b) appointment of inspectors and calling special meetings;⁸ (c) cancellation or suspension of the registry.⁹

SUBSECTION (3).—*Conditions of Registration.*

968. In order to entitle a friendly society to register, it must have seven members at least. The application must be signed by seven members and the secretary, and be accompanied by a copy of the rules and a list of the trustees or officers authorised to sue or be sued.¹⁰ No society can be registered under a name identical with, or bearing a deceptive similarity to, an already existing society, or likely, in the opinion of the registrar, to mislead the public.¹¹ A similar provision is in force with regard to Trade Unions, Building Societies, and Industrial and Provident Societies. If the assistant registrar refuse to register, the society has a right of appeal, in the first instance, to the chief registrar, and if he refuses, in Scotland, to the Court of Session.¹² A society may change its name with the approval of the registrar.⁷ The Act makes no provision for the change of name of a branch. This is usually provided for and regulated by the rules of the society itself. Societies that assure annuities must send, with their application for registry, their tables of contributions for such assurance, duly certified.¹³ This provision does not apply to payment of compensation by a friendly society under the Workmen's Compensation Act. A society doing business in more than one country shall be registered in the country in which its registered office is situate, but the registrars of the other countries must be furnished with copies of its rules and amendments.¹⁴

¹ Secs. 2-4.

² Sec. 6.

³ Sec. 5.

⁴ Sec. 96.

⁵ Sec. 30.

⁶ Sec. 99.

⁷ Sec. 69.

⁸ Sec. 76.

⁹ Sec. 77.

¹⁰ Sec. 9.

¹¹ Sec. 10.

¹² Sec. 12, see *Sons of Temperance Friendly Society, Petrs.*, 1926, S.L.T. 273.

¹³ Sec. 16.

¹⁴ Sec. 14.

969. A society, on being registered, receives an acknowledgment of registry, which corresponds to the certificate of incorporation of a joint-stock company, and is conclusive evidence of its being registered, unless such registry be proved to have been suspended or cancelled.¹ The production of a document bearing the seal or stamp of the central office is sufficient evidence of the registration; and, unless there be evidence to the contrary, no further proof is required of the signature on a document of the registrar, inspector, or public auditor.²

970. Under the Act provisions are made for the registry of societies with branches, the establishment of new branches, and the registry of branches as societies.³ A "branch" is defined as any number of the members of a society, under the control of a central body, having a separate fund administered by themselves, or by a committee or officers appointed by themselves, and bound to contribute to a fund under the control of a central body.⁴ A body which has ceased, by secession or expulsion, to be a branch of a society is prohibited from using the name of that society in any way.⁵ Any member so using the name is guilty of an offence, and liable to a fine not exceeding £5.⁶ A registered society or branch may contribute to the funds of, and take a part in the government of, another registered society without becoming a branch of it. Where the contributions are made to a medical society, this benefit extends to trade unions.⁷

SUBSECTION (4).—*Consequences of Registry.*

971. The subscription of a person being or having been a member of a registered society or branch is not recoverable at law.⁸ This provision does not apply to registered cattle insurance societies or branches thereof, or such specially authorised societies or branches thereof as the Treasury may sanction;⁹ nor does it apply to a society carrying on business under the National Health Insurance Act, 1924, so far as such business is concerned.¹⁰

972. Every registered society and branch (1) must have a registered office, and send to the registrar notice of the situation and any change therein; (2) must appoint trustees in the manner prescribed; one condition is that the same person must not be secretary or treasurer, and also a trustee; (3) must submit its accounts annually for audit; (4) must send to the registrar an annual return of its funds; (5) must, with certain exceptions, make a quinquennial valuation of its assets and liabilities; (6) must keep in an exposed place in its office a copy of its last balance-sheet and quinquennial valuation.¹¹ Failure to do what is thus required will constitute an offence.¹²

¹ Sec. 11, see *Oakes v. Turquand*, 1867, L.R. 2 H.L. 354: *Re National Debenture & Assets Corporation*, [1891] 2 Ch. 505.

² Sec. 100.

³ Secs. 17–20.

⁴ Sec. 106.

⁵ Sec. 21.

⁶ Sec. 84 (*d*).

⁷ Sec. 22.

⁸ Sec. 23.

⁹ Sec. 31.

¹⁰ National Health Insurance Act, 1924 (14 & 15 Geo. V. c. 38), s. 32.

¹¹ Secs. 24–29.

¹² Sec. 84.

SUBSECTION (5).—*Cancelling and Suspension of Registry.*

973. Registry may be cancelled by the chief registrar or the assistant registrars—(a) At the request of the society, if the registrar thinks fit; (b) With the approval of the Treasury upon proof that the acknowledgment of registry has been obtained by fraud or mistake, or that the society exists for an illegal purpose,¹ or has wilfully, and after notice from the registrar, violated any of the provisions of the Act, or has ceased to exist. Where cancelling is competent, the registrar may in lieu thereof suspend the registry for any term not exceeding three months, and may, with the approval of the Treasury, renew such suspension. Not less than two months' notice of proposed cancelling or suspension must be given to the society, and every suspension or cancellation must be duly advertised. An appeal from such may be made, as in the case of refusal to register, from the assistant to the chief registrar, and from him to the Court of Session.² Where a society has amalgamated or been converted into a company, the registry becomes void, and must be cancelled by the registrar.

SUBSECTION (6).—*Rules and Amendments.*

974. An amendment of a rule includes a new rule and a resolution rescinding a rule,³ and, when made by a registered society, is not valid until registered. For this purpose copies of the amendment, signed by three members and the secretary, are to be sent to the registrar. The registrar, if satisfied, issues an acknowledgment of registry of such amendment. If he refuse, the same mode of appeal is competent as in the case of refusal to register a society.⁴ The rules of societies established under earlier Acts are valid in so far as they are not contrary to any express provision of the 1896 Act. The registrar's acknowledgment of registry of the amendment, though essential to the validity of the society's rules, is no bar to them being challenged on a fundamental objection in a Court having jurisdiction.⁵ But the acknowledgment precludes challenge on the ground of mere irregularity in the procedure.⁶

975. Under the earlier Acts, rules and amendments, in order to be valid, had to be confirmed by justices of the peace, and under later Acts had to be certified by the registrar. New rules not confirmed, though acted on for over thirty years, were held not to be valid,⁷ and in such a case the old rules would still remain in force.⁸ Alterations on the rules

¹ Being a purpose which is unlawful apart from the rules, see *Re Middle Age Pension Friendly Society*, [1915] 1 K.B. 432.

² Sec. 77.

³ Sec. 106.

⁴ Sec. 13.

⁵ *Davie v. Colinton Friendly Society*, 1870, 9 M. 96; *Souter v. Davies*, 1895, 15 R. 261; *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163.

⁶ *Rosenberg v. Northumberland Building Society*, 1889, 22 Q.B.D. 373; *Re Quin and National Catholic Benefit and Thrift Society*, [1921] 2 Ch. 318; see also *Butter v. Springmount Co-operative Dairy Society*, [1906] 2 I.R. 193.

⁷ *R. v. Godolphin*, 1838, 8 A. & E. 338.

⁸ *Re Meredith & Whittingham*, 1856, 1 C.B.N.S. 216.

of any society, registered or unregistered, made under power contained in the rules, will be binding on all members, whether assenting or not, except that a society cannot by such alterations deprive a member of any relief, annuity, or other benefit to which he was formerly entitled, unless he has agreed to the alteration. So it was held incompetent for the managers of a friendly society, at their own hand, to alter the constitution so as to deprive persons, formerly contributors and entitled to relief, of certain benefits.¹ But it would be different if a member had expressly contracted to be bound by future alterations on the rules.²

976. Where an unregistered society, on the death of a member, paid the death allowance to a relative, such mode of payment being in accordance with the rules of the society, it was held that the deceased member's administrator could not recover the money, the rules forming the contract between the member and the society.³ A list of the matters to be provided for by the rules will be found in the First Schedule of the Act. and a model set of rules will be found in Fuller on Friendly Societies.⁴

SECTION 3.—SOCIETIES.

SUBSECTION (1).—*Unregistered Societies.*

977. Besides these societies which have by registration come under the Act, there are a great many unregistered societies, the exact status of which it is not easy to define. It will be noted that several provisions of the Friendly Societies Act apply to unregistered as well as registered societies. Thus an unregistered society assuring benefits to persons serving in the territorial army and naval volunteers is subject to the provisions of s. 43, and industrial assurance companies which insure payments on the death of children are subject to ss. 62 and 64–67; but there can no longer be an unregistered collecting society.⁵

978. Unregistered societies may be—(1) Societies not established under any previous Acts; (2) Societies so established. The effect of s. 101 (corresponding to s. 6 of the 1875 Act), and of the definition of "Registered Society" in s. 106, is that every society that has obtained a legal constitution under any of the Acts beginning with 33 Geo. III. c. 54 is still in possession of that legal constitution. The Act applies to such as if they were registered societies. All societies, therefore, legally established under previous Acts, are entitled to the privileges and obligations imposed by the 1896 Act, though their purposes may not come within those above mentioned; but their rules are valid and binding only so far as not contrary to any express provisions of the Act, and any alteration or rescission must conform to the law at present in force.

¹ *Steedman v. Malcolm*, 1842, 4 D. 1441.

² *Wilson v. Miles Platting Building Society*, 1887, 22 Q.B.D. 381; *Smith v. Galloway*, [1898] 1 Q.B. 71; *British Equitable Assurance Co. v. Baily*, [1906] A.C. 35.

³ *Ashby v. Coster*, 1888, 21 Q.B.D. 401.

⁴ 4th ed., p. 565.

⁵ Industrial Assurance Act, 1923 (13 & 14 Geo. V. c. 8), s. 1.

979. As stated above, unregistered friendly societies to which the Act applies are those whose objects are substantially, though not necessarily wholly, the same as those stated in s. 8. But where the constitution of the society is such that it is a trade union, though not registered as such, it is deprived of the benefit of the Act even though some of its objects are akin.¹ In the case of registered trade unions, provisions in the rules conferring benefits on members are not enforceable.² Questions might arise as to the position of unregistered friendly societies in relation to the Companies Acts. This uncertainty and the possibility of incurring liabilities seem to point to the desirability of such societies obtaining a definite status by registration or incorporation.

SUBSECTION (2).—*Societies with Branches.*

(i) *Conditions of Registration.*

980. Any of the societies enumerated in s. 8 of the Act may be registered as societies with branches. A branch is defined as "any number of the members of a society under the control of a central body, having a separate fund administered by themselves or by a committee or officers appointed by themselves, and bound to contribute to a fund under the control of a central body."³ Along with the application for registry there must be sent (a) a list of all the branches and the place of the registered office of each; (b) a list of the trustees or officers authorised to sue or be sued on behalf of the branch, where other than those authorised to act on behalf of the society; (c) if rules of all branches are to be identical, a statement to that effect and copies of such rules; (d) if rules not to be identical, a statement to that effect, and copies of all branch rules. Upon registration every branch becomes part of the registered society. Consequently a dissentient minority of an unregistered society, the majority of which had resolved to register, is not entitled to secede and form a new society.⁴ When a new branch is formed, notice of the establishment and other particulars must be sent to the registrar. The provisions as to acknowledgment of registry, amendment of rules, and appointment of trustees and officers apply equally to branches; but there is no provision in the Act for change of name or amalgamation with or transfer of engagements to another branch. Consequently these can only be carried out by the parent society.

(ii) *Registration of Seceding Branch as a Society.*

981. A body already registered as a branch shall not be registered as a society except on production to the registrar of a certificate from

¹ *Duke v. Littleboy*, 1880, 49 L.J. Ch. 802; cf. *Farrer v. Close*, 1869, L.R. 4 Q.B. 602; *Old v. Robson*, 1890, 6 T.L.R. 151.

² *Russell v. Amalgamated Society of Carpenters*, [1912] A.C. 421; but see *Love v. Amalgamated Society of Lithographic Printers*, 1912, 49 S.L.R. 788.

³ Sec. 106.

⁴ *M'Kenny v. The Mayor and Corporation of Barnsley*, 1894, 10 T.L.R. 533.

the chief secretary or other principal officer of the society of which it was a branch, that the body has wholly seceded or been expelled from the society.¹ Two points in regard to secession have been decided in two unreported cases: (1) that where under the rules a seceding branch is called on to make a payment to the district and the amount has been determined according to the rules, the Court has no jurisdiction to interfere in a question as to the amount;² (2) where a seceding branch has under the rules to pay to the society a sum ascertained to be the liability in respect of benefits to members who have not voted in favour of secession, and such amount has been fixed, the branch is liable to pay such amount notwithstanding that members who either voted against secession, or did not vote, afterwards consented.³ The request for the certificate should be made in writing, and if refused there is a right of appeal, in Scotland, to the Court of Session.⁴ If the rules of the society as to secession have been complied with, there can be no reason for withholding the certificate.

982. A friendly society had its registered office in England and all its officials were resident there. A branch or "Order" of the society carried on business in Scotland, and the rules of the branch or "Order" were registered in Scotland in terms of the Act. On account of financial differences with the main body, the Scottish branch took the necessary steps to secure secession, but the chief secretary or other principal officer of the society in England refused to grant the necessary certificate. On a petition by the branch to the Court of Session for an order on the society and officials to perform their statutory duty it was held that the society and the officials in their official capacities were subject to the jurisdiction of the Courts of Scotland.⁵

983. Where a branch has seceded or been expelled it must take steps to be registered; otherwise it will be regarded as an unregistered society. Further, the members of such branch cease to be members of the society and have no claims on any special fund of the society.⁶ On the other hand, a branch which after secession has been registered as an independent society will still, along with its officers, be liable for acts prior to secession. Where a branch has wholly seceded or been expelled from a society it is prohibited from using the name of that society, or any name implying it to be a branch, or the number by which it was designated as such branch.⁷ The National Health Insurance Act makes regulations in connection with the secession or expulsion of a branch of an approved society.

¹ Sec. 20 (1).

² *Hannel v. Westrope*, 1904, n.r.

³ *M'Cowatt v. Allerston*, 1921, n.r.

⁴ Sec. 20 (2).

⁵ *The Sons of Temperance Friendly Society, Petrs.*, 1926, S.L.T. 273; cf. *Mackendrick v. National Union of Dock Labourers*, 1911 S.C. 83; and *M'Dowall v. M'Ghee*, 1913, 2 S.L.T. 238. For Form of Process, see *infra*, para. 1029.

⁶ *Fisher v. Brailsford*, 1895, 30 L.J. M.C. 620.

⁷ Sec. 21.

(iii) *Expulsion of Branches.*

984. A "Court" or branch of the Ancient Order of Foresters Friendly Society was itself registered as a friendly society with rules certified by the registrar, which while providing for the election of its officers and administration of its affairs by the court, also provided that it was an auxiliary branch of the Ancient Order of Foresters, and that its whole proceedings should be subject to the general rules of that body. In the course of a dispute about the appointment of a surgeon the High Court of the body reversed the decision of the majority of the court or branch, and as they refused to obey the order pronounced, they were suspended as a branch, and a dispensation subsequently granted in favour of the minority of the court or branch substantially placing them on the footing on which the suspended court or branch had been. Under the rules the original branch was ultimately expelled. The majority, however, continued to act as if there had been no suspension and elected trustees, who raised an action against trustees elected by the minority under the new dispensation, for declarator that they were entitled to custody of the moneys, securities, etc. belonging to the court or branch, and for delivery of the same. It was held that the pursuers, in respect that the suspension was proper and regular, were expelled from the Ancient Order of Foresters; that they therefore had no corporate capacity; and consequently had no right to represent a court or branch of that body. The question of the effect in these circumstances on an expelled member's claim on the funds was not decided, but indication was given that the funds should be administered carefully so as not to prejudice any individual beneficial rights prior to the suspension.¹

SUBSECTION (3).—*Privileges of Registered Societies.*

985. These include (1) exemption, under certain conditions, from the penalties under the Unlawful Societies Act, 1799, and the Seditious Meetings Act, 1817;² (2) exemptions from stamp duty on certain documents;³ (3) power to transfer stock by order of the chief registrar, where such stock is transferable at the Bank of England or Ireland;⁴ (4) priority of claim over other creditors in the case of the death or bankruptcy of an officer, or the use of any diligence against him;⁵ (5) power to subscribe to hospitals or charitable institutions for securing benefit to members.⁶

986. With regard to the fourth privilege stated, this preferential claim has been given to friendly societies since the earliest statutes, and has been described as "very liberal, and perhaps more liberal than

¹ *Simpson v. Ramsay*, 1874, 2 R. 129.

² Sec. 32. As regards Trade Unions, see *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371.

³ Sec. 33.

⁴ Sec. 34.

⁵ Sec. 35.

⁶ Sec. 37. For Exemption from Income Tax, etc., see para. 1035, *infra*.

just, that all creditors, however meritorious, shall be sacrificed to the demand of a friendly society.”¹ The right is not lost by an omission on the part of the society, *e.g.* failure to examine the treasurer’s books.² The prior right extends over stock-in-trade, furniture, etc., not specifically belonging to the society;³ and holds good even though moneys received by such officer for the society are not in his possession *in specie*, and cannot be traced;⁴ and notwithstanding that he ceased to be treasurer before bankruptcy.⁵ It is a question whether such a claim would prevail against the Crown. The priority applies only to formally appointed officers.⁶ It does not apply in the case of bankers appointed by the society to receive moneys,⁷ nor to an incorporated banking company.⁸ The prior right only applies to moneys held by officers in virtue of their office, independent of contract, and not to debts due by them as individuals.⁹

SUBSECTION (4).—*Change of Name—Amalgamation and Conversion.*

987. A registered society has power to change its name by special resolution, but (1) the approval of the chief registrar, or if in Scotland, the assistant registrar for Scotland, is necessary; (2) the rights and liabilities of the society or its members are not affected thereby.¹⁰ The Act makes no provision for branches, but this would be regulated by the rules of the society.

988. Two or more registered societies may, by special resolution, amalgamate; also, one registered society has power to transfer its engagements to another society willing to undertake them. But, with one exception,¹¹ a registered society cannot amalgamate with or transfer its engagements to an unregistered society or a branch. The statutory requirements are set forth,¹² and are similar to those provided for the case of dissolution. The meaning of special resolution is given,¹³ but these special resolutions are only for the purposes specified in the Act,¹⁴ and cannot be passed by branches. They are not to be confused with resolutions by special meetings in accordance with the rules. In the case of registered friendly societies the Act prescribes the conditions under which special resolutions for amalgamation or transfer of engagements may be passed.¹⁵ A resolution to amalgamate not passed in conformity with the statutory conditions is liable to be reduced as null and void, though by its terms the registry of one society had been cancelled.¹⁶

¹ *Ross*, 1802, 6 Ves. 802, per Lord Eldon.

² *Absolum v. Gething*, 32 L.J. Ch. 786.

³ *Re Atkins*, 1882, 31 L.J. Ch. 406.

⁴ *Re Miller*, [1893] 1 Q.B. 327.

⁵ *Re Eilbeck*, [1910] 1 K.B. 136.

⁶ *Ashley*, 1801, 6 Ves. 440; *Ross*, *supra*.

⁷ *Orford*, 1852, 1 De G. M. & G. 483; *Whipman*, 1844, 3 Mont. D. & De G. 564.

⁸ *Swansea Friendly Society*, 1879, 11 Ch. D. 768.

⁹ *Amicable Society of Lancaster*, 1801, 6 Ves. 99; *Stamford Friendly Society*, 1808, 15 Ves. 280; *Welch*, 1894, 63 L.J. Q.B. 524; *Riddell*, 1842, 3 Mont. D. & De G. 80.

¹⁰ Sec. 69.

¹¹ Sec. 70 (5).

¹² Sec. 70.

¹³ Sec. 74.

¹⁴ Secs. 69–71.

¹⁵ Sec. 70 (3).

¹⁶ *Sheet Iron Workers' and Light Platers' Society v. Boilermakers' and Iron and Steel Shipbuilders' Society*, 1924, 40 T.L.R. 294.

989. A registered society has power, by special resolution, to convert itself into a company under the Companies Acts, or to amalgamate with or transfer its engagements to any such company.¹ Where by the rules it is provided that meetings for the "management of the society" should consist of "delegates" elected by the members, a resolution for the conversion of the society into a limited company, passed by a general meeting of "delegates," is *ultra vires* in respect that under the Act a resolution for conversion can only be carried by a certain majority of the members of the society at a general meeting of members, and that that requirement is not affected by the rule of the society providing that meetings should consist of "delegates."² A friendly society cannot turn itself into a company with objects different from those specified in the rules of the society, for the Act merely provides machinery under which the society may be converted into a company with identical objects.³ Accordingly it has been held that a scheme for the conversion of a friendly society into a company, the memorandum of association of which permitted (a) the distribution of surplus assets among members who under the rules of the society would have had no right to participate in that surplus, and (b) payments to employees of sums out of capital which were unauthorised by the society's rules, was *ultra vires*.² The conversion of a society into a company has not the effect of concurrently converting members of the society into members of the company.⁴

990. The rights of creditors are not to be prejudiced by any such amalgamation or transfer.⁵ A duly signed copy of every special resolution under the Act must be sent to the central office for registration.⁶ Failure to do so is an offence.

SUBSECTION (5).—*Inspection of Society's Affairs.*

991. Upon application of one-fifth of the members of a registered society, or of 100 members only where the society consists of 1000 and does not exceed 10,000, or of 500 members of a society exceeding 10,000, the registrar may, with the consent of the Treasury, appoint inspectors to examine into the affairs of the society, and to report thereon, or may call a special meeting of the society. In the case of a society with branches, the consent of the central body of the society is required. Evidence of the good faith of the application must be furnished, and the registrar may, if he think fit, require the applicants to give security for costs, and shall direct by whom the expenses of the inspection or meeting are to be defrayed.⁷ This power enables the registrar to examine into all or any part of the society's affairs, and it is for him to consider the nature of the matters complained of.⁸

¹ Sec. 71.

² *Wilkinson v. City of Glasgow Friendly Society*, 1911 S.C. 476.

³ *Blythe v. Birtley*, [1910] 1 Ch. 228.

⁴ *Re Blackburn Philanthropic Assurance Co.*, [1914] 2 Ch. 430.

⁵ Sec. 72.

⁶ Sec. 75.

⁷ Sec. 76.

⁸ *Professional and Civil Service Supply Association v. Dougal* (O.H.), 1898, 5 S.L.T. 359.

SUBSECTION (6).—*Property and Funds.*(i) *Vesting and Description.*

992. These are vested in the trustees for the time being, who are only liable to the extent of the sums received by them.¹ On their death, resignation, or removal, the property vests in succeeding trustees without the necessity of any conveyance or assignation, except in the case of stock or securities in public funds.² In all legal proceedings such property is sufficiently described as the property of the persons named as trustees of the society.³ Except in the case of benevolent societies, there is no limit to the extent or value of land (including heritable subjects of every description) which may be held, purchased, or sold, or leased by a registered friendly society.⁴

(ii) *Legal Investments.*

993. Every registered society may invest its funds (a) in a Post Office or Trustees Savings Bank, or (b) in the public funds, or (c) with the National Debt Commissioners; or (d) in the purchase of land, or the erection or alteration of offices or buildings thereon; or (e) in any other security (not personal) expressly directed by its rules; or (f) “in any investment in which trustees are for the time being by law authorised to invest trust funds.”⁵ Special provisions are made for investments with the National Debt Commissioners, and a statutory rate of interest is fixed.⁶

SUBSECTION (7).—*Obligations of Officers.*

994. An “officer” is defined as any trustee, treasurer, secretary, or member of the committee of management of a society or branch, or person appointed by the society or branch to sue or be sued on its behalf.⁷ Every officer of a registered society having receipt or charge of its money must, if required by the rules, give security, and must render accounts when called on.⁸ If an officer neglects or refuses, on demand, to pay over funds belonging to the society, or to give an account, the trustees may sue upon the bond of caution, or apply to the Sheriff Court for an order against the officer.⁹ Where the treasurer of a friendly society had, by the rules, to find security for his intromissions, and the society was guilty of gross neglect in regard to the control exercised by them over the treasurer, such neglect was held sufficient to free his cautioners from liability.¹⁰

SECTION 4.—MEMBERS.

SUBSECTION (1).—*Rights of Members.*

995. These include—(1) right to a copy of the rules, for which the society may charge any sum not exceeding one shilling; (2) right *gratis*

¹ Sec. 49.² Sec. 50.³ Sec. 51.⁴ Sec. 47.⁵ Sec. 44, and 1908 Act, s. 4.⁶ Sec. 52.⁷ Sec. 106.⁸ Secs. 54 and 55.⁹ Sec. 55.¹⁰ *Thistle Friendly Society of Aberdeen v. Garden*, 1834, 12 S. 745.

to copies of the last annual return and balance-sheet; (3) right to inspect the books. The right to inspect seems to include a right to take copies.¹ The court cannot inquire into the reasons why the person requires the inspection.² The inspection may be made by an agent of the party having the right, provided no reasonable objection to such person could be taken by the society.³ The onus of proving that the appointment of an agent is not made in good faith rests on the society opposing the inspection;⁴ (4) right to insure for benefits. The amount of such benefits is restricted, it being provided that no member, or person claiming through a member, is entitled to receive from one or more societies or branches a gross sum exceeding £300, including bonuses, or an annuity over £52.⁵ On the construction of the rules of a friendly society it was held that the executive council, and not the branch society or court were the judges of the sufficiency of the evidence required to entitle a member to the permanent disablement allowance.⁶ It has to be noted also that where a society assures an annuity over £30, it loses the privilege of exemption from income tax; (5) power to accumulate surplus contributions; (6) special privileges to members who are militiamen or volunteers, when in discharge of their duty as certified by the commanding officer.⁷

SUBSECTION (2).—*Loans to Members.*

996. A loan may be made to a member provided he has been a member for one year, and the sum does not exceed one-half of the amount of an insurance on his life.⁸ And subject to certain restrictions, and out of a special fund, a society may grant loans to members on their personal security with or without sureties.⁹ Under the Act a loan to a member exceeding £50 is prohibited. Consequently where a loan for a larger sum was made to a member his surety or cautioner was freed from liability.¹⁰ A society, one object of which was to make advances to members against their obligation to make weekly deposits, was held to have an implied power of borrowing, so that in a winding-up under the supervision of the Court the members were liable to contribute to the debts incurred by borrowing.¹¹ Where the trustees of a friendly society lent out of the surplus funds a sum of £300 to A., on the security of a joint and several promissory note made by A., B., and C., none of the makers being a member of the society, and C. having died, the trustees made a claim on his estate, it was held on appeal that as

¹ *Mutter v. Eastern and Midlands Rly Co.*, 1888, 38 Ch. D. 92; *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130.

² *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708.

³ *Re Credit Co.*, 1879, 11 Ch. D. 256; *Bevan v. Webb*, [1901] 2 Ch. 59; *Norey v. Keep*, [1909], 1 Ch. 561.

⁴ *Dodd v. Amalgamated Marine Workers' Union*, [1924] 1 Ch. 116.

⁵ Sec. 41, and 1908 Act, s. 3.

⁷ See ss. 38–43.

⁶ *Manners v. Fairholme*, 1872, 10 M. 520.

⁸ Sec. 45.

⁹ Sec. 46.

¹⁰ *Lougher v. Molyneux*, [1916] 1 K.B. 716.

¹¹ *United Deposit Friendly Relief Society*, 1903, 11 S.L.T. 85.

it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorised, and that the trustees were not barred from making good their claim.¹

SUBSECTION (3).—*Payments on Death of Member.*

(i) *Certificate.*

997. Before any such payment is made by a registered society, a certificate of death must be produced, except in cases of death at sea, death by colliery explosion, or other accident, where the body cannot be found, or any death certified—in Scotland by the procurator-fiscal—to be the subject of inquiry.²

(ii) *Right of Nomination.*

998. Every member of a registered society (other than a benevolent society or working men's club) or branch thereof has the right to dispose of a sum, payable on his death, by nomination.³ This nomination being of the nature of a statutory will, the provisions of the statute must be strictly complied with. The requisites are:—³

- (1) The member nominating must not be under sixteen years of age.
- (2) The nomination must be in writing, signed by the nominator, and delivered to the registered office of the society. A nomination authenticated by the member's mark only (she being illiterate) and the signatures of two witnesses is not a writing under her hand in the sense of the section, and being of a testamentary nature is of no effect in law.⁴
- (3) The sum payable must not exceed £100, and includes contributions to, or deposits in, separate loan account, and sums accumulated under the provisions of the Act,⁵ with interest.
- (4) The person nominated must not be an officer or servant of the society, unless also the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator.⁶
- (5) Any revocation or variation must, like the nomination itself, be in writing and delivered. A will cannot operate as a valid revocation of a nomination.⁷
- (6) The member's marriage operates *ipso facto* as a revocation. By the 1908 Act,⁸ a subsection was added making a nomination, or variation, or revocation of a nomination effectual where the insurance of a member of a branch is effected through the society or a superior branch.

On satisfactory evidence of the death of the nominator being produced the nominee is entitled to payment, and the receipt of a person

¹ *Re Coltman*, 1881, 19 Ch. D. 64; cf. *Brougham v. Dwyer*, 1913, 108 L.T. 504.

² Sec. 61.

³ Secs. 56 and 57.

⁴ *Morton v. French*, 1908 S.C. 171.

⁵ Sec. 42.

⁶ See *Lavin v. Howley*, 1897, 102 L.T.J. 560.

⁷ *Bennet v. Slater*, [1899] 1 Q.B. 45.

⁸ Sec. 5.

under sixteen is valid. It was thought at one time that if the nominee predeceased the nominator his legal representative would be entitled to the sum nominated; ¹ but this view is now doubtful.²

(iii) *Intestacy of Member.*

999. Where no nomination is made, and a member dies intestate, the society has power, without letters of administration, to distribute the sum among such persons as appear to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive that sum. Where the member is illegitimate, payment may be made to those persons who in the opinion of the trustees would have been entitled to the sum had he been legitimate, or, if no such persons exist, the society will deal with the money under the direction of the Treasury.³ The power to distribute is entirely discretionary, and the trustees cannot be compelled by action to exercise that discretion.⁴ The trustees are freed from all claims if payments have been made in accordance with the provisions of the Act,⁵ and where money has been paid in ignorance of a subsequent marriage the receipt of the nominee is a valid discharge. The trustees ought to make some reasonable inquiry before payment; but should it afterwards transpire that there was an error in payment—as, for instance, if the member left a will of which the society had no notice—the trustees are not liable, and the claimant's remedy, as provided by the section, is against the recipient of the money.⁶ The sum payable must not exceed £100. Otherwise it can only be paid to the legal representatives of the deceased, and is subject to estate duty.⁷

SUBSECTION (4).—*Payment on Death of Child.*

1000. (1) The provisions under the Friendly Societies Act dealing with such payments ⁸ apply to all unregistered as well as to registered societies and branches; also to trade unions.⁹ They are (with the exception of s. 63, which is re-enacted in the Industrial Assurance Act) extended to collecting societies and industrial assurance companies. They also extend to companies registered under the Companies Acts for burial insurance, which are not subject to the Life Assurance Companies Acts.¹⁰

(2) The sum to be insured on the death of a child, either in one or more societies, is restricted to (a) £6 where the child is under three years, (b) £10 where under six years, (c) £15 where under ten

¹ *Caddick v. Highton*, 1899, 68 L.J. Q.B. 281.

² See observations in *In re Griffin*, [1902] 1 Ch. 135, 140; *Eccles Provident Industrial Society v. Griffiths*, [1911] 2 K.B. 275, 284; [1912] A.C. 483, 490.

³ Sec. 58.

⁴ *Escritt v. Todmorden Co-operative Society*, [1896] 1 Q.B. 461.

⁵ Sec. 60. See *Symington v. Galashiels Co-operative Store Co.*, 1894, 21 R. 371.

⁶ *Cruickshank v. Munro*, 1875, Guthrie's Sheriff Court Cases, 2nd ser. 185.

⁷ Sec. 59, see also s. 58.

⁸ Secs. 62–67.

⁹ 39 & 40 Vict. c. 22, s. 2.

¹⁰ *Newbold Friendly Society*, [1893] 2 Q.B. 128.

years of age.¹ In such cases no payment will be made except to the parent, or personal representative of the parent, and only on production of a certificate of death issued by the registrar under certain conditions, including satisfactory evidence by a medical certificate, or otherwise, of the cause of death.

(3) A society failing to comply with the provisions of the Act in regard to such payments in respect of the death of children under ten, will be guilty of an offence, as will also be a person attempting to evade the provisions of the Act, as by producing a false certificate.²

(4) These restrictions in regard to payments on the death of children do not apply where the person insuring has an interest in the life of the person insured. While evidence of such interest is in general essential, it may sometimes be presumed, such as in case of a man in his own life, a wife in the life of her husband, and a husband in the life of his wife.³ In the absence of pecuniary interest a parent has no insurable interest in a child's life;⁴ nor a child in a parent's life simply because the parent is dependent on him.⁵ The possible moral obligation to pay the funeral expenses of a relative is not sufficient.⁶ On the other hand, it was held that a promise to the mother of a child to take care of the child, and help to maintain it, constituted an insurable interest in the child's life.⁷ When a policy has been found to be void, the insurer cannot recover the premiums already paid by him;⁸ but the premiums would be recoverable if the representation on which the insured relied was fraudulent,⁹ provided he was not a party to the fraud.¹⁰ By the Children Act, 1908,¹¹ a person by whom an infant, in respect of which notice is required to be given under Part I. of that Act, is kept, shall be deemed to have no insurable interest in the life of the child for the purposes of the Life Assurance Act, 1774.

SECTION 5.—DISPUTES.

SUBSECTION (1).—*Classes of Disputes within the Act.*

1001. With the object of avoiding the expense of litigation, the Friendly Societies Acts have always made provisions for the settling of disputes. The present Act provides a mode for the settlement of every dispute between—

¹ Friendly Societies Act, 1924 (14 & 15 Geo. V. c. 11), s. 2 (1).

² Sec. 84.

³ *Griffiths v. Fleming*, [1909] 1 K.B. 805; *Wight v. Brown*, 1849, 11 D. 459.

⁴ *Halford v. Kymer*, 1830, 10 B. & C. 724; *Worthington v. Curtis*, 1875, 1 Ch. D. 419.

⁵ *Howard v. Refuge Friendly Society*, 1886, 54 L.T. 644; *Greenslade v. London and Manchester Industrial Assurance Co.*, 1913, 2 L.J. C.C.R. 62 (case of a stepfather).

⁶ *Harse v. Pearl Life Assurance Co.*, [1903] 2 K.B. 92; but see *Industrial Assurance Act*, 1923, ss. 3 and 30.

⁷ *Barnes v. London, Edinburgh and Glasgow Life Insurance Co.*, [1892] 1 Q.B. 864.

⁸ *Howard v. Refuge Friendly Society*, *supra*; *Elson v. Crookes*, 1911, 106 L.T. 462.

⁹ *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482.

¹⁰ *Howarth v. Pioneer Life Assurance Society*, 1912, 107 L.T. 155.

¹¹ 8 Edw. VII. c. 67, s. 7.

- (a) A member, or person claiming through a member, or under the rules of a registered society or branch, and the society or branch, or an officer thereof; or
- (b) Any person aggrieved who has [for not more than six months]¹ ceased to be a member of a registered society or branch, or any person claiming through such person aggrieved, and the society or branch, or an officer thereof; or
- (c) Any registered branch of any society or branch, and the society or branch of which it is a branch; or
- (d) An officer of any such registered branch, and the society or branch of which that registered branch is a branch.
- (e) Any two or more registered branches of any society or branch, or any officers thereof respectively.²

The disputes within the Act must be between the society and a person in his capacity as member. Where the relationship between the parties is different, the ordinary legal remedies are applicable.³

1002. Disputes within the Act cover a claim raising a question whether the second wife of an enrolled member was entitled to enrolment and to the benefits of the society;⁴ and questions as to the distribution of a fund in the hands of the trustees;⁵ the award of an arbitration committee in regard to the conduct of an officer involving his expulsion;⁶ and a dispute between two persons where their claim was made through a member.⁷

So in an action against a savings bank arising out of a dispute with a depositor, such disputes being by statute referred to the registrar of friendly societies, the registrar's decision was held to be final even where the question involved was whether a savings bank or its depositor should suffer from a forgery.⁸

SUBSECTION (2).—*Mode of Settlement.*

(i) *By Rules of Society.*

1003. Where there is a direction in the rules of the society as to the mode to be adopted, the decision given in accordance therewith is final and binding on all parties. Such a rule generally refers the matter to an arbiter or arbiters. Under certain conditions the mode so provided may be varied, for (1) the parties may by consent (unless expressly forbidden by the rules) refer the dispute to the registrar, or (2) where the rules themselves prescribe a reference to the justices, the dispute has now to be determined by a Court of summary jurisdiction, or by consent of parties in the County Court, *i.e.* in Scotland, the Sheriff

¹ The words within brackets were repealed by the Friendly Societies Act, 1908, s. 6.

² Sec. 68 (1).

³ *Mulkern v. Lord*, 1879, 4 App. Cas. 182; *Morrison v. Glover*, 1849, 19 L.J. Ex. 20.

⁴ *Stone v. Liverpool Marine Society*, 1894, 63 L.J. Q.B. 471.

⁵ *Grinham v. Card*, 1852, 7 Ex. 838.

⁶ *Glasgow District of Ancient Order of Foresters v. Stevenson*, 1899, 2 F. 14.

⁷ *Lewis v. Paulton*, 1907, 14 S.L.T. 818.

⁸ *Melrose v. Adam*, 1897, 24 R. 483.

Court of the county. Thus the Court will pronounce a decree enabling a society to enforce the decision of the arbitration committee.¹

1004. Where a member of a friendly society had been expelled by a decree of his Lodge, and had that decree reversed on appeal to a higher court of the society, an action in the Sheriff Court brought under this section for declarator that he was a member and entitled to certain benefits, and for payment of these was held to be competent, and decree of declarator and payment was granted.² Where a petition has been presented to the Sheriff craving a decree to enable the order of an arbitration committee of a society on an expelled secretary to deliver up the books in his possession, no question of rights of property arises in the petition; and where the award of the arbitration committee is in order, a decree should be pronounced to enable the order contained in the award to be enforced.¹ But a petition to the Sheriff to enforce an order by a superior Court of a society directing one of its branches to reinstate a certain person as a member thereof is not competent under this section or at common law, in respect that no operative decree could be pronounced.³

(ii) *Where no Rules, or Rules not Complied with.*

1005. Where there is no provision in the rules, or where no decision is made within forty days after an application to the society for a reference under its rules, the parties may apply to a Court of summary jurisdiction, or to the County Court, being in Scotland the Sheriff Court.⁴ Where the arbitrators under the rules gave a decision, a Court of summary jurisdiction has no jurisdiction to hear a complaint that the decision by the arbitrators was improperly made, such decision being valid until set aside, and it may be a question whether a Court of law can set such a decision aside.⁵

(iii) *Power to State a Case to the Court of Session, and recover Documents.*

1006. Notwithstanding anything contained in the Arbitration Act, 1889,⁶ or in any other Act, the court or person to whom, under the rules, the dispute is referred may, though not compelled to do so, state a case on any question of law for the opinion in Scotland of either Division of the Court of Session, and such court or person may also grant warrant for the recovery of documents and examination of havers as might be granted by any Court of law.⁷ An action in the Small

¹ *Glasgow District of Ancient Order of Foresters v. Stevenson*, 1899, 2 F. 14.

² *Collins v. Barrowfield United Oddfellows*, 1915 S.C. 190.

³ *Gall v. Loyal Glenbogie Lodge of the Oddfellows Friendly Society*, 1900, 2 F. 1187.

⁴ Sec. 68 (6).

⁵ *Bache v. Billingham*, [1894] 1 Q.B. 107.

⁶ 52 & 53 Vict. c. 49, s. 19.

⁷ Sec. 68 (7). This subsection was introduced to nullify the effect of the House of Lords decision in *Tabernacle Building Society v. Knight*, [1892] A.C. 298.

Debt Court, relating to a dispute between a friendly society and one of its members, is not governed as to its mode of review by the Small Debt Act of 1837,¹ but may be competently appealed on a case stated as provided by the Friendly Societies Act, and in such a case it is not a fatal objection that the summons did not expressly refer to the Act;² but such a case must be stated during the course of the reference, and not after the Court or arbitrator has given judgment.³

SUBSECTION (3).—*Jurisdiction of Courts of Law.*

1007. Where there are rules of the society directing the settlement of disputes, the words of the Act "shall be decided" are imperative, and oust all other jurisdiction, except such as (1) is conferred by the consent of parties; (2) arises when no decision is made within the prescribed time; and (3) arises when a case is stated to the Court of Session;⁴ but the onus of showing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right.⁵ Where the rules of a friendly society provided that all disputes "shall be referred to and decided by the Sheriff of the county," it was held that review by the Court of Session of a judgment on the merits was excluded, but that review by the Sheriff-Principal of a judgment of the Sheriff-Substitute, dismissing the action as incompetent, was not excluded.⁶ Again, where the rules of a building society provided that disputes should be referred to arbitration, but there was no provision as to the manner in which arbitrators should be elected, it was held that the Sheriff had jurisdiction at common law, so that his decision was subject to appeal.⁷

1008. Where matters in dispute are determined by the society's rules, a Court of law may interfere where the decision is not properly and regularly arrived at.⁸ To enable a Court of law to interfere with the decision given by the persons appointed under the rules the averments would require to be very strong, amounting practically to a charge of abuse of office.⁹ It was held in an English case that the Court had no jurisdiction to interfere with the award given by the arbitrators under the rules, unless there was an error upon the face of it, or it was shewn to have been corruptly obtained. In this case Wood, V.-C., said: "The Legislature intended carefully to provide

¹ 7 Will. IV. & 1 Vict. c. 41, s. 31.

² *Linton v. City of Glasgow Friendly Society*, 1895, 23 R. 51.

³ *Smith v. Scottish Legal Life Assurance Society*, 1912 S.C. 611.

⁴ *Manson v. Doull*, 1840, 2 D. 1015; *Cooper v. Bertram Shotts Friendly Society*, 1825, 3 S. 648; *Manners v. Fairholme*, 1872, 10 M. 520; *Reeves v. White*, 1852, 17 Q.B. 995; *Crichton v. Trs. of Dalry Myrtle Lodge of Free Gardeners*, 1904, 6 F. 398.

⁵ *Mulkern v. Lord*, 1879, 4 App. Cas. 182, per Lord O'Hagan.

⁶ *Leitch v. Scottish Legal Burial Society*, 1870, 9 M. 40.

⁷ *Galashiels Provident Building Society*, 1892, 20 R. 821.

⁸ *M'Keanan v. Greenock Lodge of United Operative Masons' Association*, 1873, 11 M. 548, per Lord Deas at p. 550; *Davie v. Colinton Friendly Society*, 1870, 9 M. 96, per Lord Pres. Inglis at p. 104; *M'Gowan v. City of Glasgow Friendly Society*, 1913 S.C. 991.

⁹ *Rombach v. M'Cormack*, 1896, 4 S.L.T. 174.

that these societies should not be dragged before Courts of law or equity, if it could possibly be avoided, and has taken care to enact that the whole discussion of their affairs shall be disposed of in a cheap and summary manner by the decision of an arbitrator or justices, as the parties shall choose; and when they have once made their election, the power of the justice or of the arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any Court of law or equity.”¹ So an action of damages was dismissed which was raised by a collector against his society for dismissal contrary to the rules, and for having been deprived of the right of selling his collecting book, inasmuch as the rules provided for an appeal to a meeting of delegates and he had not followed this course.²

1009. The jurisdiction conferred on the Sheriff under the Friendly Societies Act of 1855 was privative.³ Under the Act of 1875 and subsequent Acts, the words of the section providing for a dispute being taken, in certain events, to the Sheriff Court, are permissive and not peremptory. While the section confers jurisdiction on the Sheriff Court, it does not exclude the jurisdiction of the Supreme Court, there being no negative words and no words of exclusion.⁴

SUBSECTION (4).—*Disputes not within the Act.*

(i) *Generally.*

1010. With regard to disputes not within the Act, the ordinary legal remedies are applicable, and the jurisdiction of Courts of law is not ousted. Such disputes include questions as to whether a society, in making an alteration on its rules fundamentally affecting its constitution, and certified by the Registrar, conformed to the necessary conditions.⁵ An action by a member against a friendly society for declarator that the appointment of another member to the board of management was void in respect that under the rules he was ineligible for election, was held to be competent, as the jurisdiction of the Court was not ousted.⁶ So the claim of a society upon its treasurer for misappropriating and keeping in his hands the moneys of the society is not a dispute within the meaning of the Act.⁷ The clause providing for settlement of disputes in the Act regulating Industrial and Provident Societies is similar to that under Friendly Societies Acts. In an action by an executor to

¹ *Armitage v. Walker*, 1855, 2 K. & J. 211.

² *Finlay v. Royal Liver Friendly Society*, 1901, 4 F. 34; *Batty v. Scottish Legal Life Assurance Society*, 1902, 4 F. 954.

³ *Davie v. Colinton Friendly Society*, 1870, 9 M. 96.

⁴ *Re Royal Liver Friendly Society*, 1887, 35 Ch. D. 332.

⁵ *Davie v. Colinton Friendly Society*, *supra*; *Somerville, etc. v. Society of Meters and Weighers of Leith*, 1868, 6 M. 796; but see *Hoey v. Macfarlane*, 1858, 4 C.B. N.S. 718.

⁶ *M'Gowan v. City of Glasgow Friendly Society*, 1913 S.C. 991.

⁷ *Sinden v. Bankes*, 1861, 30 L.J. Q.B. 102. For other examples of disputes not within the Act, see *Winter v. Wilkinson*, [1915] 1 Ch. 317; *M'Ellistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; *Heard v. Pickthorne*, [1913] 3 K.B. 299; *Re Quinn and National Catholic Benefit and Thrift Society*, [1921] 2 Ch. 318.

recover a sum alleged to be due to a deceased member by an industrial and provident society, liability was denied by reason of arrangement with the next of kin of the deceased, and the right of the pursuer to represent the deceased member was denied. It was held that the question raised was not a dispute within the Act, and that the jurisdiction of the Court was not ousted.¹

(ii) *As between Society and Expelled Member.*

1011. Prior to the passing of the 1908 Act it had been decided that disputes within the Act did not include the question whether a person expelled from the society had been improperly expelled and was entitled to be reinstated, and that therefore the jurisdiction of the Court was not excluded, inasmuch as the society was denying him his membership.² By the 1908 Act, s. 68 of the principal Act was amended by the deletion of the words "for not more than six months," and a new subsection (8) was added to section 68.³ This new subsection provides that "the expression 'dispute' includes any dispute arising on the question whether a member or person aggrieved is entitled to be or continue to be a member or be reinstated as a member. . . ."

The effect of this amendment of the Act is to exclude the jurisdiction of the Court in disputes between the society and expelled members, where formerly the jurisdiction was upheld. Accordingly such disputes are determinable by the rules, notwithstanding the lapse of any time from the cessation of membership. It has, however, to be noted that, by a proviso in the new subsection (8), the application of the section is expressly limited, in the case of a person who has ceased to be a member, to disputes which arose while he was a member, or arise out of his relationship as a member to the society.

SECTION 6.—TERMINATION OF SOCIETIES.

1012. It has been noticed above that a society may continue its existence by amalgamation, or, in another form, by conversion into a company, and that in such a case its registry will, on request, be cancelled. The existence of a registered friendly society may also terminate: (a) By the occurrence of an event declared in the rules to be the termination of the society; (b) voluntarily, by the act of the members; (c) compulsorily, by the award of the registrar.⁴

SUBSECTION (1).—*Voluntary Dissolution.*

1013. This requires, in the case of friendly societies and branches, the consent of five-sixths in value of the members, including honorary

¹ *Symington v. Galashiels Co-operative Store Co.*, 1894, 21 R. 371.

² *Palliser v. Dales*, 1897, L.R., 1 Q.B. 257; *Prentice v. London*, 1875, L.R., 10 C.P. 679; *Willis v. Wells*, [1892] 2 Q.B. 225; *Symington v. Galashiels Co-operative Store Co.*, *supra*, at p. 376.

³ 1908 Act, s. 6.

⁴ Sec. 78.

members, and of all those receiving any relief, annuity, or benefit, unless the claims of such have been duly satisfied, or adequate provision made for the purpose. In the case of other classes of societies registered under the Act, the consent of three-fourths of the members is required. Such consent must be testified by their signatures to the instrument of dissolution. A signature given by an agent is not good in Scotland,¹ but in England it has been held to be sufficient.²

1014. Where a juvenile branch of a society is, by the rules, to be governed by a committee of the society, the juvenile branch cannot be dissolved without the consent of the committee of the society.³ Whether or not proxies will be allowed in voting depends on the rules. Though the majority bind the minority to a dissolution, they cannot alter their rights under the rules, so as to deprive them of benefits or bind them to liabilities they had never undertaken.⁴

1015. A branch of a friendly society cannot dissolve without the consent of the central body. Where a court or branch did so, and divided its funds among its members, the court's trustees, its officials, and a committee of management were held personally liable for the moneys they had divided, though two years had elapsed since the division.⁵

1016. The instrument of dissolution must be made in due form, and set forth (a) the liabilities and assets; (b) the number of members and the nature of their interests; (c) the claims of creditors and the provision to be made for their payment; and (d) the intended appropriation or division of the funds, unless this is to be left to the award of the chief registrar.⁶ The instrument does not require to be stamped.⁷

SUBSECTION (2).—*Compulsory Dissolution.*

1017. Upon the application of a fixed number of members the registrar may, after one month's notice, make an investigation into the affairs of a society, and, if satisfied that the funds are insufficient to meet the existing claims, or that the fixed rates of contribution are insufficient to cover the benefits assured, may, if he think it expedient, dissolve the society by award, and make directions for the disposal of its assets. Such award may be suspended by him for a period to enable the society to make suitable adjustments of its contributions and benefits. The dissolution of a society must in every case be advertised by the registrar within twenty-one days in the *Edinburgh Gazette* and a local newspaper, and, failing proceedings within three months thereafter by any member to set it aside, such dissolution will be final. Seven days' notice must be given to the central office by anyone intending to take proceedings

¹ *Second Edinburgh and Leith Building Society v. Aitken*, 1892, 29 S.L.R. 456.

² *Dennison v. Jeffs*, [1896] 1 Ch. 611.

³ *Rudd v. James*, [1896] 2 Ch. 554.

⁴ *Kemp v. Wright*, [1895] 1 Ch. 121; *Botten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441.

⁶ *Kelly v. Peacock*, 1917, 55 S.L.R. 65.

⁵ Sec. 79.

⁷ Sec. 33 (d).

to set aside the dissolution.¹ A member having a claim on the funds of the society is not entitled to take proceedings to set aside the registrar's award merely on the ground that he is dissatisfied with the provision made for satisfying his claim.²

SUBSECTION (3).—*Disposal of Funds.*

(i) *Where Society Dissolved.*

1018. As stated above, where a registered society is dissolved under the Act, the intended appropriation or division of its funds and property is set forth in the instrument of dissolution, or is stated in said instrument to be left to the award of the chief registrar.

(ii) *Unexpended Funds of Defunct Society.*

1019. The question arises as to what is to become of the funds of a society which, through the death of all the members and of all persons entitled to its benefits, and the consequent failure of its objects, has become defunct, where there is no provision in the rules to provide for such a contingency.

1020. In this connection it is necessary first to ascertain whether the society is a charity and its funds applicable *cy près*. It is in some respects an open question, and concerns societies whether registered or unregistered. Institutions purely for the relief of poverty or distress are clearly charitable institutions, and in doubtful cases it is important to ascertain whether poverty is the essential qualification for participation in the benefits of the association. Thus a friendly society which was established to provide by subscriptions, contributions, and fines an "invested fund" for the relief, by means of annuities, of members, their widows, and children, if in distressed circumstances, was held to be a charity, and a legacy to the society, not being required for the remaining annuity, was applicable *cy près*.³ On the other hand, a society or association which raises funds by subscriptions and fines for the mutual benefit of the members and their relatives is not a charity,⁴ even though some of the members had agreed that their widows should not take any benefit;⁵ nor is a society whose members were to provide by subscriptions and fines a fund for their mutual benefit in sickness, lameness, or old age, poverty not being a necessity.⁶ Assuming, however, that the society is not a charity, and that therefore the unexpended funds are not applicable *cy près*, it is not of importance in such a case whether the society is under the Friendly Societies Acts or not, as the law will be equally applicable to any associated body of persons formed for mutual benefit.

¹ Sec. 80.

² *Wilmot v. Grace*, [1892] 1 Q.B. 812.

³ *Re Buck*, [1896] 2 Ch. 727; and see *Pease v. Pattinson*, 1886, 32 Ch. D. 154.

⁴ *Mitchell v. Burness*, 1878, 5 R. 954; *Bakers of Paisley v. Stentmasters and Mags. of Paisley*, 1836, 15 S. 200.

⁵ *Cunnack v. Edwards*, [1896] 2 Ch. 679.

⁶ *Re Clark's Trust*, 1875, 1 Ch. D. 497.

1021. Where the membership of a society for the benefit of the widows and children of existing and future members was reduced to one, and no means existed under the constitution for electing new members, the surviving member and annuitants were held to have no right to divide the funds among themselves. The question was considered, but not decided in this case, as to how the funds were eventually to be disposed of. Lord Deas said: "I do not entertain much doubt that where money is subscribed for a particular purpose which totally fails, the money belongs to the subscribers and their representatives, if it can be ascertained who they were and are."¹ The question of the disposal of the funds was settled in a later English case.² The circumstances of that case were, that all the members of a friendly society had died by 1879, that in 1892 the last annuitant died, and that the society then had a surplus or unexpended fund of £1250. It was held by Chitty J. that there was a resulting trust in favour of the ordinary members of the society from time to time, or their respective representatives, in shares in proportion to the amount contributed by each such ordinary member to the funds of the society, and that the amounts paid as fines or forfeitures, and annuities received by widows, were not to be taken into account. This decision was, however, reversed by the Court of Appeal, who held that the funds of the society passed to the Crown as *bona vacantia*. In Scotland, where a society is in such a position, the proper course would be for the trustees, judicial factor, or persons having an interest and title, to raise an action of multiplepoinding and exoneration, calling the Lord Advocate, as representing the Crown as *ultimus hæres*, as a defender.

SECTION 7.—OFFENCES AND PENALTIES.

1022. The Act enumerates a number of offences which may be committed by a society or branch, or an officer or member, and for which penalties will be imposed.³ Where a society commits an offence the officers are held equally to be offenders, unless they can prove ignorance, or an attempt to prevent the offence being committed.⁴

1023. The Act further provides that it is a crime (a) to furnish rules, etc., to persons on the pretence they are the rules of a registered society or branch, and with intent to mislead them; (b) knowingly to make a false or fraudulent statement in any statutory declaration under the Act.⁵ The same section also deals with misapplication of funds and enacts (c) that any person guilty of obtaining any property of a registered society or branch by false representations or imposition, or of withholding and misapplying any such property, shall be liable on summary conviction to a fine not exceeding £20 and costs, and be ordered to

¹ *Mitchell v. Burness*, 1878, 5 R. 954; see *Smith v. Lord Advocate*, 1899, 1 F. 741.

² *Cunnack v. Edwards*, [1896] 2 Ch. 679, reversing [1895] 1 Ch. 489; see also *Sharp v. Society of Sailors of the Port of Dunbar* (O.H.), 1903, 10 S.L.T. 572.

³ Sec. 84.

⁴ Sec. 85.

⁵ Sec. 87.

restore such property, or in default thereof to be imprisoned with or without hard labour for a term not exceeding three months.

1024. The following important amendments in the earlier Acts have to be noted:—

- (1) The complaint brought need not be authorised by a general meeting, but may be authorised (a) by the society, the trustees, or the committee of management; or (b) by the chief registrar, or any assistant registrar under his authority.¹
- (2) The element of false representation or imposition is expressly limited to the offence of obtaining possession, and is not required to be proved where the offence charged is withholding or misapplication.²

The proceedings under this section are, however, of a criminal nature, and would not be applicable where there was no fraudulent intention. The section was subsequently amended by the following proviso:—³

Provided that where on such a complaint against a person of withholding or misapplying property, or applying it for unauthorised purposes, it is not proved that that person acted with any fraudulent intent, he may be ordered to deliver up all such property, or to repay any sum of money applied improperly, with costs, but shall not be liable to conviction, and any such order shall be enforceable as an order for the payment of a civil debt recoverable summarily before a Court of summary jurisdiction.

1025. Any person wilfully falsifying a balance-sheet, contribution-book, return, or other document, is liable to a fine not exceeding £50.⁴ Any other offence under the Act, for which a penalty is not provided, may be punished by a fine not exceeding £5.⁵ Such fines are recoverable in a Court of summary jurisdiction, *i.e.* in Scotland the Sheriff Court of the county,⁶ and the persons entitled to sue are the chief registrar, any assistant registrar, or any person aggrieved.⁷ Fines imposed by the rules are recoverable in the same manner, but penalties imposed by the rules must not be contrary to the provisions of the Act. Where an officer of a friendly society was charged with misappropriation of money, and an order for payment was made, and he failed to implement the order, he was sentenced to be imprisoned for two months. When the trustees of the society afterwards sought to recover the amount which the defender ought to have paid, it was held that the conviction and punishment were a bar to their action for payment.⁸

1026. Any person may appeal from any order or conviction under the Act in accordance with the provisions of the Summary Jurisdiction (Scotland) Acts.⁹

¹ Sec. 87 (4).

² Sec. 87 (3).

³ 1908 Act, s. 9.

⁴ Sec. 88.

⁵ Sec. 89.

⁶ Sec. 102.

⁷ See *Robinson v. Currey*, 1881, 7 Q.B.D. 467, 475; *Scott v. Mackintosh*, 1876, Guthrie's Sheriff Court Cases, 1st ser. 211.

⁸ *Vernon v. Watson*, [1891] 2 Q.B. 288.

⁹ Sec. 93.

SECTION 8.—LEGAL PROCEEDINGS.

SUBSECTION (1).—*Title to Sue.*

1027. A registered society or branch may sue or be sued through the trustees of the society or branch, or any other officers authorised by the rules, without other description than the title of their office. In actions at the instance of a member or person claiming through a member, it may be sued in the name of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the Court in which the proceedings are brought; but the words "on behalf of the society or branch" (naming the same) must be added.¹ Where an unregistered friendly society was divided into lodges, it was held that an action for payment of a provision payable under the rules by the central committee of the society must be directed against the society, or its central committee, and not against the particular lodge to which the party suing belonged.² A branch or court of a society was suspended and afterwards expelled by the executive council of the central body, and the minority of the court was authorised by the council to assume the name and number of the suspended court. The majority continued to meet as if no suspension and expulsion had taken place, and appointed trustees to raise an action as trustees of the court for declarator that they were entitled to the custody of the moneys, etc., of the court, and for their delivery. It was held that they had not instructed a title to sue.³

SUBSECTION (2).—*Service.*

1028. The summons or other writ is sufficiently served by personal service on the officer or other person sued, or by leaving a true copy at the registered office of the society, or at any place of business of the society, within the jurisdiction of the Court, or, if such office or place of business be closed, by posting the copy on the outer door thereof. In all cases where personal service is not made, or a true copy left as aforesaid, a copy of the summons or writ must be sent in a registered letter addressed to the committee at the registered office of the society, and posted at least six days before any further procedure.⁴ This section was amended⁵ so as to provide a mode of service where proceedings are taken against a society or branch for the recovery of any fine under the Act, and also to meet the difficulty where the person being sued is himself a trustee of the society or branch. The proceedings may then be brought by the other trustees or trustee of the society or branch.

SUBSECTION (3).—*Process—Appeal.*

1029. Where a branch of a friendly society has taken steps to secure secession from the society, and the chief secretary or other principal

¹ Sec. 94 (1-3).

² *M'Kernan v. Greenock Lodge of United Operative Masons' Association*, 1873, 11 M. 548.

³ *Simpson v. Ramsay*, 1874, 2 R. 129. ⁴ Sec. 94 (4) and (5). ⁵ 1908 Act, s. 11.

officer of the society has refused or failed to give the certificate required, the appeal allowed by the statute¹ may be made in Scotland by a petition under and in terms of s. 91 of the Court of Session Act, 1868.² The word "appeal" in the Friendly Societies Act falls to be construed in a popular sense, as otherwise the judicial remedy allowed would be futile. The form of appeal in England is usually by the process of mandamus, and a petition under s. 91 of the 1868 Act is a convenient and competent method of appeal in Scotland.³

SUBSECTION (4).—*Evidence.*

1030. Every document bearing the seal or stamp of the central office shall be received in evidence without further proof, and every document purporting to be signed by the chief or any assistant registrar, or any inspector, or public auditor or valuer under the Act, is, in the absence of any evidence to the contrary, to be received in evidence without proof of the signature.⁴

SECTION 9.—MISCELLANEOUS MATTERS.

SUBSECTION (1).—*Recovery of Subscriptions.*

1031. Except in the case of cattle insurance societies, and in some cases of specially authorised societies, the subscriptions of members are not recoverable at law.⁵

SUBSECTION (2).—*Liability of Funds.*

1032. The funds of a friendly society may be made liable for a wrong done to a member through violation of the society's rules by the office-bearers.⁶ Where the Court set aside a resolution by the members of an unincorporated friendly society to dissolve the society and divide the funds, it was held that the whole expenses might be paid out of the funds of the society.⁷

SUBSECTION (3).—*Assignment of Shares in Security.*

1033. Where a friendly society made a payment to a member on account of his shares after he had assigned them in security of a debt due by him, without such assignation being intimated to the society, it was held that the society was not liable to the assignee for the sum so paid. Lord Young said: "It is not necessary to decide whether shares in a friendly society can be assigned as security for a debt, though it is almost impossible to avoid forming an opinion on the question. My own opinion is that they cannot, otherwise than by substituting the creditor in the debtor's place as a member of the society."⁸

¹ Sec. 20 (2).

² 31 & 32 Vict. c. 100.

³ *Sons of Temperance Friendly Society, Petrs.*, 1926, S.L.T. 273.

⁴ Sec. 100.

⁵ Sec. 23.

⁶ *Blue v. Pollock*, 1866, 4 M. 1042.

⁷ *Milne v. Fraser*, 1859, 22 D. 33.

⁸ *Grigor Allan v. Urquhart*, 1887, 15 R. 56.

SUBSECTION (4).—*Diligence under Bond and Disposition in Security.*

1034. In the case of the death, resignation, or removal of a trustee of a registered society or branch, the Act dispenses with the necessity of a conveyance or deed of transmission to the succeeding trustees.¹ But a charge under a bond and disposition in security granted in favour of trustees *nominatim* and their successors, made upon the debtor in name of the trustees who were the successors in office is insufficient without legal evidence connecting the chargers with the former trustees. The question was discussed but not decided, whether letters of horning or the production of evidence of their appointment would suffice.²

SUBSECTION (5).—*Exemption from Income Tax.*

1035. A registered friendly society which is precluded by Act of Parliament or under its rules from assuring to any person a sum exceeding £300 by way of gross sum, or £52 a year by way of annuity, is entitled to exemption from tax under Schedules A, C, and D.³ Approved societies under the National Health Insurance will be exempt from tax in respect of income derived from funds or credits relating to their State insurance business.

SECTION 10.—UNREGISTERED FRIENDLY SOCIETIES.

1036. The Friendly Societies Act, 1896, consolidating previous enactments, applies almost exclusively to "registered societies," which include societies legally established under previous statutes, though not actually registered. The only exceptions which apply to unregistered societies are s. 43 as to members of the Territorial Force,⁴ and ss. 62–67 as to payments on the death of children. As no unregistered society is allowed to carry on industrial assurance, there can no longer be an unregistered collecting society.⁵

Trade Unions, being societies whose main objects are in restraint of trade, cannot get the benefits of friendly societies, though the Court will interfere in certain cases, *e.g.* to prevent the funds being applied otherwise than according to the rules,⁶ and for reinstatement of a member illegally expelled under the rules.⁷

1037. Apart from these sections, it is difficult to define and determine the exact position and status of an unregistered society. Such societies, when formed for general and laudable purposes, and not for the acquisition of gain by the society or its members, are not necessarily unlawful,

¹ Sec. 50.² *Mitchell v. Allardice*, 1916 S.C. 689.³ Income Tax Act, 1918 (8 & 9 Geo. V. c. 40), s. 39.⁴ Territorial Army and Militia Act, 1921 (11 & 12 Geo. V. c. 37), s. 1.⁵ Industrial Assurance Act, 1923 (13 & 14 Geo. V. c. 8), s. 1.⁶ *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; *Wilson v. Amalgamated Society of Engineers*, [1911] 2 Ch. 324.⁷ *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; *Kelly v. National Society of Operative Assistants*, 1915, 84 L.J. K.R. 236.

though they may have failed to acquire a statutory status by registration, and are not entitled to the facilities, exemptions, and privileges conferred by statute. Many of the decisions above quoted will therefore apply equally to them. At one time such societies were held to be partnerships, but this is now doubtful. A club was also formerly regarded as a partnership, though it is now to be distinguished; and an unregistered friendly society seems to partake more of the legal character of a club. Like it, it has no corporate existence. It has been held in England that the Court has jurisdiction to wind up an unregistered society in order that the rights of all parties beneficially interested may be ascertained, and the funds distributed accordingly.¹

1038. An unregistered friendly society whose income does not exceed £160 is entitled to the exemption from Income Tax given under the Income Tax Acts to persons whose income does not exceed £160.² Otherwise it would seem that an unregistered friendly society is not exempt from income tax or corporation duty unless it could claim exemption on other grounds.³

1039. Unregistered societies may be illegal by statute in two ways—

(1) The Companies Consolidation Act, 1908,⁴ enacts that no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of the Act, for the purpose of carrying on any business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament. If such a society, therefore, is one having for its object the acquisition of gain, it will be rendered illegal by want of registration. Thus an unregistered mutual benefit society from its nature was held to be illegal under the above section, and so unable to maintain an action.⁵ So also was a loan society through not being registered.⁶ But an association formed before the Act was held not to be affected by not being registered.⁷ The question whether or not a society is formed for gain is itself not always easy to decide; for the English Courts have gone so far as to hold that a mutual marine association, though it had not for its object the acquisition of gain by the association itself, had for its object the acquisition of gain by the individual members, and had therefore no legal existence if not registered under the Companies Acts.⁸ According to this decision, all societies which have a rule or practice of dividing funds would appear to be illegal.⁹

¹ *Re Lead Company's Workmen's Fund Society*, [1904] 2 Ch. 196; *Blake v. Smither*, 1906, 22 T.L.R. 698; but cf. *Sharp v. Dunbar Sailors' Society*, 1903, 10 S.L.T. 572.

² Income Tax Act, 1918 (8 & 9 Geo. V. c. 40), s. 39 (1).

³ See *Incorporation of Tailors in Glasgow v. Commissioners of Inland Revenue*, 1887, 24 S.L.R. 516; *Re Linen and Woollen Drapers', etc. Institution*, 1887, 58 L.T. N.S. 949.

⁴ 8 Edw. VII. c. 69, s. 1 (2).

⁵ *Jennings v. Hammond*, 1882, 9 Q.B.D. 225.

⁶ *Shaw v. Benson*, 1883, 11 Q.B.D. 563.

⁷ *Shaw v. Simmons*, 1883, 12 Q.B.D. 117.

⁸ *Re Padstow Total Loss and Collision Assurance Association*, 1882, 20 Ch. D. 137.

⁹ But see *Re One and All, etc. Association*, 1909, 25 T.L.R. 674.

1040. (2) In certain circumstances it might be contended that an unregistered society fell within the Assurance Companies Act, 1909,¹ which applies to persons, or bodies of persons, corporate or incorporate, not being registered under the Acts relating to friendly societies or to trade unions, whether established before or after the commencement of the Act, and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes as defined in the Act, viz. life assurance, fire assurance, accident insurance, employers' liability insurance, or bond investment.² Failure by societies to comply with the somewhat onerous provisions of this statute involves heavy penalties. An unregistered friendly society which carries on business coming within the above description is liable to the provisions of the Assurance Companies Act, unless it has obtained exemption. The Board of Trade may, on the application of an unregistered friendly society, extend to the society the exemption conferred on registered friendly societies, if it appears to the Board after consulting the chief registrar that the society is one to which it is expedient to do so.³ It is therefore clear that it is safer for all friendly societies to be registered, and thus, besides becoming entitled to the benefits of the Act, to evade any questions as to their legality.

¹ 9 Edw. VII. c. 49.

² For definition of bond investment see Industrial Insurance Act, 1923 (13 & 14 Geo. V. c. 8), s. 42.

³ Assurance Companies Act, 1909 (9 Edw. VII. c. 49), s. 35.

FRUITS.

See LIFERENT AND FEE.

FUGITATION.

See CRIME (PROCEDURE).

FUGITIVE OFFENDERS.

See CRIME (PROCEDURE); EXTRADITION.

FUNERAL EXPENSES.

See EXECUTOR; PRIVILEGED DEBTS.

FUNGIBLES.

See LOAN.

FURIOUS.

FURIOSITY.

See INSANITY AND LUNACY.

FURIOUS DRIVING.

See CRIME; MOTOR CARS.

FURLOUGH.

See ARMED FORCES OF THE CROWN.

FURNITURE.

See HYPOTHEC; LIFERENT AND FEE.

FURTHCOMING.

See ARRESTMENT.

GABLE.

See COMMON GABLE.

GAMBLING.

See GAMING, BETTING, AND LOTTERIES.

GAME LAWS, THE.

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SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Meaning of "Game."*

1041. The popular meaning of "game" is all wild land animals usually killed for sport and dealt with thereafter as food. There is no legal definition of game, and in order to find whether a particular wild animal is game in the sense of any particular statute, it is necessary to

examine the statute to find whether that particular animal is included. Some animals may be game for the purposes of one statute, but not covered by another. The wild animals enumerated in one or other of the statutes are: grouse, black game, ptarmigan, partridge, pheasant, woodcock, snipe, quail, landrail, bustard, wild duck, deer (including roe), hares, and rabbits. Capercailzie may possibly be held to be a variety of black game or grouse. The eggs of pheasants, partridges, grouse, and black or moor game are included for the purposes of one statute.¹ The animals covered by any particular statute will be enumerated when that statute is considered. Many wild birds not usually considered to be game are protected by the Wild Birds Protection Acts.²

SUBSECTION (2).—*Game Rights at Common Law.*

1042. The common law gives no efficient protection, either to the game itself against extermination, or to landowners and their tenants against injury to their crop and stock, or to the general public against the risks which would attend the promiscuous shooting of game by all and sundry. Wild animals being *res nullius* and therefore capable of appropriation by any person, the only common law restriction upon the killing of them arises from the landowner's right to the exclusive use of his own land.³ His game rights consist in (1) the right, in common with others, to take what is *res nullius*, and (2) the right to exclude those others from his own land for that purpose, which is recognised as a valuable incident to his property right in the land.⁴

1043. A landowner cannot, however, defend this exclusive possession at his own hand. If he ejects a trespasser from his land with unnecessary violence he is liable to be tried for assault.⁵ If a spring gun is set and kills some person, whoever set it or ordered it to be set may be tried for murder.⁶ A gamekeeper who fires a gun at a poacher may be tried for an assault or for murder, according to the result of his act,⁷ and will be liable in damages.⁸ The landlord's only remedies are (1) an action of damages for damage done to crop, stock, fences, trees, structures on the ground, etc., and (2) interdict against trespass. Interdict may entail trouble, expense, and delay, and where obtained is effectual only against the defenders called.⁹ It also requires proof of reasonable expectation that trespass will be repeated.

¹ Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 1. ² See para. 1102, *infra*.

³ *Earl of Breadalbane v. Livingstone*, 1791, 3 Pat. 221, per Lord. Pres. Campbell at p. 223.

⁴ *Pollock, Gilmour & Co. v. Harvey*, 1828, 6 S. 913, per Lord Corehouse; *Birkbeck v. Ross*, 1865, 4 M. 272, per Lord Barcapple.

⁵ *Earl of Eglinton v. Campbell*, 1770, M'Laurin's Criminal Trials, p. 505; *Kennedy*, 1838, 2 Swin. 213; *Bell v. Shand*, 1870, 7 S.L.R. 267; cf. *Wood v. North British Rly. Co.*, 1899, 37 S.L.R. 6, per Lord Trayner.

⁶ *Craw*, 1827, Syme, 188, 210; *Shaw* (J.) 194.

⁷ *Donald Kennedy*, 1838, 2 Swinton 213; *John Reid*, 1837, 2 Swinton 236 n.; cf. *Reg. v. Wesley*, 1859, 1 F. & F. 528.

⁸ *M'Donald v. Robertson*, 1911, 27 Sh. Ct. Rep. 103.

⁹ *Pattison v. Fitzgerald and Ors.*, 1823, 2 S. 536 (N.E. 468).

SUBSECTION (3).—*The Game Laws.*

1044. The Game Statutes supply the lack which is evident in the common law. They may be classified thus: (1) statutes restricting the pursuit of game to landowners or those authorised by them; (2) statutes regulating the seasons in which qualified persons may take game; (3) statutes directed against poaching (trespass in pursuit of game); and (4) statutes requiring sportsmen and game dealers to take out various licences. There are also various statutes directed to the protection of, *inter alia*, game.¹ The Ground Game Acts² enable farmers to protect their crops against ground game (hares and rabbits).

SECTION 2.—QUALIFICATION TO KILL GAME.

SUBSECTION (1).—*Act 1621, c. 31.*

1045. The Act is in these terms: "That no man hunt or hault at any time hereafter who hath not a plough of land in heritage, under the pain of one hundred pounds.³ . . ." The land must be held in property. Tenancy, even on long lease, or servitude, does not found the qualification.⁴ Hunting includes shooting,⁵ but not snaring hares.⁶ The Act is still in force.⁷ A qualified person may authorise an unqualified person to shoot over his land.⁸ The authority may be occasional, or by lease, or permanent in a feu-right.⁹ A plough-gate is about 100 acres, and the land must be in Scotland.¹⁰

SUBSECTION (2).—*Game (Scotland) Act, 1772.¹¹*

1046. Every person in Scotland not qualified to kill game having in his custody, without leave of persons qualified, at any time of year, hares, partridges, pheasants, muir fowl (grouse), ptarmigan, heath fowl (black game), snipe, or quail, shall forfeit 20s. for the first offence, and 40s. for every subsequent offence. There have been several cases under the Act since 1860,¹² but in the last reported case,¹³ it was remarked that the Act was only enforced in Roxburghshire, and the opinion was given that it should be dropped. There was formerly doubt whether a person qualified in respect of his own land could shoot over another's

¹ Sections 9 and 10, *infra*.

² Section 7, *infra*.

³ Scots, £8, 6s. 8d. stg.

⁴ *Forbes v. Anderson*, 1st February 1809, F.C.; *Farquharson v. Earl of Aboyne*, 16th November 1814, F.C.; 6 Pat. 380; *Earl of Hopetoun v. Wight*, 17th January 1810, F.C.; *Welwood v. Husband*, 1874, 1 R. 507; cf. *Marquis of Huntly v. Nicol*, 1896, 23 R. 610.

⁵ *Marquis of Tweeddale v. Somner*, 1808 (note to *Earl of Hopetoun v. Wight*, *supra*); *Trotter v. M'Ewan*, 8th July 1809, F.C.

⁶ *Cassilis*, 1826, Shaw (J.) 146.

⁷ *Earl of Hopetoun v. Wight*, *supra*; *Oliphant v. Bell*, 1903, 19 Sh. Ct. Rep. 39.

⁸ *Trotter v. M'Ewan*, *supra*.

⁹ *Marquis of Huntly v. Nicol*, *supra*.

¹⁰ *Earl of Mansfield v. Hendersons*, 18th January 1810 (rep. in *Ness on Game Laws*, p. 40).

¹¹ 13 Geo. III. c. 54, s. 3.

¹² *Stevenson v. Melville*, 1863, 4 Irv. 411 (Roxburgh); *Thomson v. Romanes*, 1865,

5 Irv. 1 (Berwick); *M'Dougall v. Douglas*, 1875, 3 Coup. 110 (Roxburgh).

¹³ *Downs v. Stevenson*, 1882, 4 Coup. 567, per Lord Young.

land,¹ but this was decided in the negative, first as regards enclosed,² and then as regards unenclosed,³ lands. The exclusive right to kill game is therefore an incident of the ownership of land⁴ on which the game is found.

SUBSECTION (3).—*Following Game beyond the March.*

1047. One shooting near his march may not follow over the march unwounded game which he has raised in his own land. Whether he may follow game which he has wounded⁵ is a question of circumstances, depending upon his belief at the time as to the extent of the wound and the probability of the injured game being immediately recovered. It would seem that no trespass is committed if the game is either "dead or moribund,"⁶ *i.e.* "wounded and no longer able to make its escape."⁷ To enter land to take away game already dead is not a breach of the Day Trespass Act, 1832.⁸

SECTION 3.—CLOSE TIME STATUTES.

1048. A number of early Scots Acts were all superseded by the Game (Scotland) Act, 1772,⁹ which lays down close times for grouse and ptarmigan (10th December to 12th August), heath fowl or black game (10th December to 20th August), partridges¹⁰ (1st February to 1st September), pheasants (1st February to 1st October), and imposes penalties on any person wilfully taking, killing, destroying, carrying, selling, buying, or having in possession these birds in their close times. Exceptions are (1) partridges or pheasants taken in the open season and kept in mews or breeding places;¹¹ (2) game taken in season and kept by dealers up to ten days after the season closes;¹² and (3) live game bought or sold or kept, solely for the purpose of breeding or for sale in a live state, where the person buying, selling, or keeping it is licensed to deal in game, or holds a licence to kill game in force at the time.¹³

1049. Offences against the Act of 1772 can only be tried before the Sheriff or Sheriff-Substitute.¹⁴ Game killed in contravention of the statute is not forfeited, but still belongs to the captor as common law

¹ Ersk. ii. 6, 6.

² *Watson v. Earl of Errol*, 1763, Mor. 4991; *Tweeddale v. Dalrymple*, 1778, Mor. 4992.

³ *Earl of Breadalbane v. Livingstone*, 1790, Mor. 4999; *affd.* (H.L.) 1791, 3 Pat. 221.

⁴ *Pollock, Gilmour & Co. v. Harvey*, 1828, 6 S. 913.

⁵ *Donald v. Boddan*, 1828, Syme 303.

⁶ *Nicoll v. Strachan*, 1912, 7 Adam 31, per Lord Guthrie at p. 36.

⁷ *Ibid.*, per Lord Justice-Clerk Macdonald at p. 34.

⁸ *Lord Macdonald v. Maclean*, 1879, 4 Coup. 205. See Section 4, *infra*.

⁹ 13 Geo. III. c. 54, s. 1.

¹⁰ *Ibid.*, as amended by Partridges Act, 1799 (39 Geo. III. c. 34).

¹¹ 1772 Act, s. 2.

¹² Game Act, 1831 (1 & 2 Will. IV. c. 32), applied to Scotland by 23 & 24 Vict. c. 90, s. 13.

¹³ Revenue Act, 1911 (1 Geo. V. c. 2), s. 10.

¹⁴ 40 & 41 Vict. c. 28, s. 10.

proprietor.¹ This applies to all statutes where there is no declaration of forfeiture.

1050. The Hares Preservation Act, 1892,² enacts a close time for hares (March to July inclusive). The prohibition is only against selling or exposing for sale, and it does not apply to foreign imported hares. Close times for wild birds which are not strictly game are laid down by the Wild Birds Protection Acts.³

SECTION 4.—POACHING STATUTES.

1051. Poaching, that is, trespass in pursuit of game, is not a crime at common law. The word itself does not occur in any of the statutes, but is conveniently used to include the various acts which are prohibited by the following statutes.

SUBSECTION (1).—*Night Poaching Statutes.*⁴

1052. For the purposes of these Acts “night” means between the expiration of the first hour after sunset and the commencement of the last hour before sunrise. “Game” means hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

(i) *Two Offences.*

1053. If during the night any person (a) unlawfully⁵ takes or destroys any game or rabbits on any land whether open or enclosed (or under the Act of 1844 on public roads, paths, and entrances to land), or (b) unlawfully enters or is on such land (not roads, etc.) with any instruments for the purpose of taking or destroying game, such person is liable to imprisonment with hard labour not exceeding three months for a first offence; for a second offence six months, with further imprisonment on failure to find caution against future offences; a third offence is punishable by penal servitude for seven years.⁶ In practice much milder penalties are in use.

1054. Two quite separate methods of contravention are set out above.⁷ The second—being on land with instruments—cannot be committed on a public road,⁸ nor does it refer to rabbits.⁹ Several persons may be convicted on proof of a common purpose, though only one has the instruments.¹⁰ It has been held that an agricultural tenant may be on his farm unlawfully by night for the purpose of killing game,¹¹ but it has been held otherwise under the Day Trespass Act.¹²

¹ *Scott v. Everitt*, 1853, 15 D. 288. ² 55 Vict. c. 8, s. 3. ³ See para. 1103, *infra*.

⁴ Night Poaching Acts of 1828 and 1844 (9 Geo. IV. c. 69 and 7 & 8 Vict. c. 29).

⁵ *Mitchell v. M'Kay*, 1911, 27 Sh. Ct. Rep. 100.

⁶ 9 Geo. IV. c. 69, s. 1; 7 & 8 Vict. c. 29, s. 1.

⁷ *Duncan*, 1864, 4 Irv. 474.

⁸ *Mavis v. M'Lullich and Fraser*, 1860, 3 Irv. 533; *Burns*, 1863, 4 Irv. 437.

⁹ *Mitchell v. Campbell*, 1863, 4 Irv. 257.

¹⁰ *Granger*, 1863, 4 Irv. 432.

¹¹ *Smith v. Young*, 1856, 2 Irv. 402.

¹² See following subsection.

(ii) *Apprehension and Resistance.*

1055. Offenders caught in the act may be apprehended and given as soon as possible into custody, by the owner or occupier of the land, his gamekeeper or servant, or anyone assisting such. Seizure may be on the land, or elsewhere if the pursuit commenced on the land.¹ An offender using the first of the above methods on any road or path may be similarly apprehended by the same persons in relation to the adjoining land.² In either case assault by the offender with an offensive weapon (e.g. stone or fist)³ on an authorised arrester is a misdemeanour involving penal servitude for seven years or imprisonment with hard labour for two years.⁴ An authorised person using violence to apprehend is not guilty of assault, nor is a poacher using only such violence as is necessary to prevent his arrest by an unauthorised person.⁵ It is a question whether "occupier" includes a person who has only a right to kill game on the lands; probably it does.⁶

(iii) *Poaching in Combination with Arms.*

1056. Any person, in a combination of three or more, any of them being armed, who unlawfully enters or is on land by night to take or destroy game or rabbits, is liable to imprisonment with hard labour not exceeding three years.⁷ It is not necessary that violence should have been used, but if that were proved a heavier sentence would be imposed.⁸

(iv) *Use of Firearms by Night.*

1057. The use of firearms or guns of any kind at night for killing game or hares is prohibited.⁹ No one having a right to kill ground game, under the Ground Game Act¹⁰ or otherwise, may use firearms for that purpose by night.¹¹

SUBSECTION (2).—*Poaching by Day.*

(i) *Day Trespass in Pursuit of Game.*

1058. Under the "Day Trespass Act," 1832,¹² "day" is the period between the beginning of the last hour before sunrise and the expiration of the first hour after sunset.¹³ "Game" is not defined, but the definition in the Night Poaching Act, 1828,¹⁴ will be followed in practice.

¹ 9 Geo. IV. c. 69, s. 2.

² 7 & 8 Vict. c. 29, s. 1.

³ *H.M. Advocate v. Mitchell*, 1887, 1 White 321; *Macnab*, 1845, 2 Broun 416.

⁴ But see para. 1053, *supra*.

⁵ *M'Arthur v. Cameron*, 1866, 5 Irv. 243; *Reg. v. Wesley*, 1859, 1 F. & F. 528; *Reg. v. Wood*, 1859, 1 F. & F. 470; *Reg. v. Price*, 1851, 5 Cox 277; *Reg. v. Addis*, 1834, 6 Car. & P. 388.

⁶ *Stewart v. Bulloch*, 1880, 8 R. 381; cf. English cases in above note.

⁷ 9 Geo. IV. c. 69, s. 9.

⁸ *Swanston and Ors.*, 1836, 1 Swinton 54.

⁹ Hares (Scotland) Act, 1848 (11 & 12 Vict. c. 30), s. 4.

¹⁰ See Section 7, *infra*.

¹¹ Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6.

¹² Game (Scotland) Act, 1832 (2 & 3 Will. IV. c. 68).

¹³ *Ibid.*, s. 3.

¹⁴ See preceding subsection.

1059. Any person who commits a trespass in the daytime by entering upon any land without leave of the proprietor, in pursuit of game or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or cories is liable to a maximum fine of £2 and costs, on summary conviction. If he has his face blackened or is otherwise disguised, or if five or more persons trespass in concert, the maximum penalty is £5 and costs each. An accused may prove any matter which would have been a defence to an action at law for such trespass.¹ Persons hunting or coursing and following their quarry into another's land from a place where they were entitled to hunt or course do not contravene the Act.²

(ii) *Constructive Entry.*

1060. A person who remains on a road but sends his dog on to the land in pursuit of game, has "entered upon" the land so as to justify conviction.³ A person who has authority to be on the land may contravene the Act by unlawfully taking game there.⁴ But where a farm servant was trapping rabbits as ordered by his master, which order the farmer, at common law, had the right to give, the servant was found not guilty, because he was not bound to know that the farmer had surrendered his common law right in the lease.⁵ A farmer cannot be convicted under this Act of unlawfully entering or being upon his own farm.⁶

(iii) *Apprehension upon Refusal to Quit.*

1061. Any trespasser in pursuit of the above-mentioned animals (deer excepted) may be required by the person having the right to kill game on the land, or the occupier, or a gamekeeper or other person authorised by either, to quit the land and to give his full name and address; upon refusing the name, staying on the land, or returning to it for the same unlawful object, the trespasser may be apprehended by such person and conveyed before the Sheriff, when upon summary conviction he may forfeit a maximum penalty of £5 and costs. No one may be detained more than twelve hours before being brought before the Sheriff.⁷

1062. It is open to question whether a person with a mere permission to shoot is a "person having the right to kill game on the land." A conviction, to be good, need not say that the accused was required to quit the lands, but only that he was required to give name and address.⁸

¹ 1832 Act, s. 1.

² *Ibid.*, s. 4.

³ *Stoddart v. Stevenson*, 1880, 4 Coup. 334, reversing *Colquhoun v. Liddell*, 1876, 3 Coup. 342; *Wood v. Collins*, 1890, 2 White 497.

⁴ *Earl of Selkirk v. Kennedy*, 1850, Shaw (J.) 463; *Raper v. Duff*, 1860, 3 Irv. 529; *James v. Earl of Fife*, 1880, 4 Coup. 321; *Maxwell v. Marsland*, 1889, 2 White 176; *Colt v. Webb*, 1898, 2 Adam 591.

⁵ *Calder v. Robertson*, 1878, 4 Coup. 131; *Jack v. Nairne*, 1887, 1 White 350; cf. *Earl of Selkirk v. Kennedy*, *supra*, and *Morrison v. Anderson*, 1913, 7 Adam 201.

⁶ *Smellie v. Lockhart*, 1844, 2 Broun 194; *Earl of Kinnoull v. Tod*, 1859, 3 Irv. 501; cf. *Smith v. Young*, 1856, 2 Irv. 402 (night poaching case).

⁷ 1832 Act, s. 2.

⁸ *Birrel v. Jones*, 1859, 3 Irv. 546.

It is not trespass in pursuit of game if the game is dead ¹ or moribund.² Since the power of arrest relates not to the trespass, but to the refusal,³ probably, in a case of constructive entry by a man on a road sending his dog upon the lands, refusal to call off the dog or to desist from aiding actual trespassers, would justify arrest. Those entitled to make an arrest may also request a trespasser to give up game in his possession, and on his refusal may take it from him.⁴ Assaulting or obstructing any person in the execution of the Act involves an additional penalty not exceeding £5, and imprisonment in default of payment.⁵

SUBSECTION (3).—*Prevention of Poaching.*

1063. The Poaching Prevention Act, 1862,⁶ defines “game” as hares, pheasants, partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of pheasants, partridges, grouse, and black or moor game.

(i) *Powers of Search and Seizure.*

1064. It is lawful for any constable or peace officer in any highway, street, or public place to search any person whom he may have good cause to suspect of coming from land where he was unlawfully in pursuit of game, or any person aiding or abetting him, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used ⁷ for killing or taking game, and also to stop and search any cart or conveyance in which such constable shall have good cause to suspect that any such game, or such article, is being carried by any such person, and if he finds such game or article, to seize and detain it.⁸ “Nets or engines” have been held not to include a ferret, a mesh needle, or a quantity of twine.⁹

(ii) *Prosecution following on Seizure.*

1065. The constable must then summon the arrested person before the Sheriff, and if convicted of having unlawfully obtained the game or of having used the seized articles for taking game unlawfully, or of having been accessory, the arrested person is liable to a maximum fine of £5, with forfeiture of game, gun, nets, etc., which are sold or destroyed by order of the Sheriff, the proceeds of a sale being paid to the treasurer of the county or borough where the conviction is made. If there is no conviction they are restored to the possessor. It is held in England that the Act does not empower the constable to arrest the suspected person, but only to apply for a warrant.¹⁰

¹ *Lord Macdonald v. MacLean*, 1879, 4 Coup. 205.

² *Nicoll v. Strachan*, 1912, 7 Adam 31.

³ *Mackenzie v. Maberly*, 1859, 3 Irv. 459.

⁵ *Ibid.*, s. 6.

⁷ See *Perth Procurator-Fiscal v. Ferguson*, 1885, 1 Sh. Ct. Rep. 378.

⁸ 1862 Act, s. 2.

⁴ 1832 Act, s. 5.

⁶ 25 & 26 Vict. c. 114, s. 1.

⁹ *Gillan v. Milroy*, 1877, 3 Coup. 551.

¹⁰ *Reg. v. Spencer*, 1863, 3 F. & F. 854.

(iii) *Constables.*

1066. The Act confers no powers on gamekeepers as such. It was, however, the custom for justices of the peace to appoint gamekeepers as constables under certain Scots Acts,¹ but in order that constables under this Act might be under the control of the chief constable, the Constables (Scotland) Act, 1875, enacted that no constable appointed under the above Scots Acts should act under the Poaching Prevention Act.²

(iv) *Evidence, etc.*

1067. While the police may search a suspect, their suspicions are of no value, even as corroborative evidence, at the subsequent trial.³ Where persons were found early in the morning with a bundle containing dead rabbits, still warm, and nets, etc. still wet from recent use, it was held (1) that the constable had sufficient ground for suspicion, and (2) that the Sheriff was entitled to infer unlawful trespass, without the parties having been seen on, or coming from, any particular lands.⁴ Where a Sheriff inferred that a carrier with rabbits in his possession was accessory before the fact, the conviction was sustained, it being left undecided whether a conviction could be sustained where the accused was shewn to be accessory only after the fact.⁵ Conviction under this Act may proceed upon evidence which would not justify conviction under a charge of trespassing in pursuit of game.⁶ An accused, employed to kill rabbits under the Ground Game Act, 1880, was held not to be "unlawfully" upon the land.⁷ There must always be reasonable evidence.⁸

SECTION 5.—LICENCES.

1068. The following licences are required in connection with game:—

- | | |
|-----------------------------------|---------------------------|
| 1. Licence to employ gamekeepers. | 2. Licence to keep a dog. |
| 3. Gun licences. | 4. Licence to kill game. |
| 5. Licence to deal in game. | |

These subjects have all been treated under the title **EXCISE**.⁹

SECTION 6.—LANDLORD AND GAME TENANT.

SUBSECTION (1).—*Nature of Lease of Shootings.*

1069. At one time the Courts were inclined to hold that a lease of shootings was a mere personal franchise,¹⁰ but as the practice of granting

¹ 1617, c. 8; 1633, c. 25; 1661, c. 38.

² 38 & 39 Vict. c. 47, s. 1.

³ *Jameson v. Barty*, 1893, 1 Adam 91.

⁴ *M'Kenzie v. Lockhart*, 1890, 2 White 534; see also *Brown v. Turner*, 1862, 32 L.J. (N.S.) M.C. 106; but cf. *Reg. v. Spencer*, 1863, 3 F. & F. 857.

⁵ *Young v. Jameson*, 1891, 2 White 581.

⁶ *Jameson v. Barty*, *supra*, per Lord M'Laren.

⁷ *Bruce v. Prosser*, 1898, 2 Adam 487.

⁸ *Scatterty v. Barclay*, 1898, 2 Adam 497.

⁹ Vol. VI. p. 453, *ante*; see also Tait, *Game and Fishing Laws*, 2nd ed., c. vi.

¹⁰ *Earl of Aboyne v. Innes*, 22nd June 1813, F.C.; *Pollock, Gilmour & Co. v. Harvey*, 1828, 6 S. 913; *Birkbeck v. Ross* (O.H.), 1865, 4 M. 272.

shooting leases became more common, a game lease came to be recognised as a tack of land.¹ A game lease was, under the earlier decisions, held not to be protected against singular successors by the Act 1449, c. 18, but in view of the later decisions, although there has been no decision overruling the older cases, it may be taken that it is so protected. Shootings cannot be conveyed as a separate heritable tenement either by grant or as a real burden, and a right of shooting cannot be made a real burden on lands so as to exclude the proprietor from shooting over them.²

1070. An agricultural lease is also a tack of land, but only for agricultural uses, and is not presumed to carry shooting rights. If it is to do so, it must state so, expressly or by clear implication.³ This holds good even in very long leases.⁴ But when the purpose of a lease of land is inconsistent with the landlord retaining the shooting, as in a building lease of a quarter of an acre, the landlord's shooting rights are excluded. In England an agricultural lease carries shooting rights over the land unless these are expressly reserved.

SUBSECTION (2).—*Who can Grant a Shooting Lease?*

1071. The granter must be either the proprietor of the lands, or the person in possession of a right of shooting over them which is not a mere personal privilege.⁵ It has been decided that one of two joint proprietors cannot grant shooting rights for rent to a third person, although he might perhaps do so gratuitously.⁶ But this decision turned on the proposition that such a lease was not within ordinary management, which does not agree with modern conceptions.⁵ A servitude of pasturage does not include the right of killing game on the servient tenement.⁷ Liferenters, heirs of entail in possession, and trustees holding for others may grant leases of shootings, if their titles do not restrict these powers. A lease by trustees for the lifetime of an heir of entail, in which no power was taken by the trustees to terminate the lease, has been held *ultra vires*, and reduced.⁸ But the lease, though void, regulated the rights of the parties *inter se* for the period during which it was acted upon.⁹

SUBSECTION (3).—*Characteristics of Shooting Leases.*

(i) *Leases of the Land.*

1072. In one type of lease the land is let, as in agricultural or pastoral leases, but of course with different stipulations, *e.g.* as to maintaining

¹ *Macpherson v. Macpherson*, 1839, 1 D. 794; *Sinclair v. Lord Duffus*, 1842, 5 D. 174; *Menzies v. Menzies*, 1861, 23 D. (H.L.) 16; *Stewart v. Bulloch*, 1880, 8 R. 381.

² *Beckett v. Bisset* (O.H.) 1921, 1 S.L.T. 33; see also *Tailors of Aberdeen v. Coutts*, 1840, 3 Ross's L.C. 269.

³ *Earl of Hopetoun v. Wight*, 17th January 1810, F.C.; *Copland v. Maxwell*, 1868, 9 M. (H.L.) 1, per Lord Westbury.

⁴ *Welwood v. Husband*, 1874, 1 R. 507. ⁵ *Marquis of Huntly v. Nicol*, 1896, 23 R. 610.

⁶ *Campbell and Stewart v. Campbell*, 24th January 1809, F.C.

⁷ *Forbes v. Anderson*, 1st February 1809, F.C.

⁸ *Elliott's Trs. v. Elliott*, 1893, 31 S.L.R. 36. ⁹ *Elliott's Trs. v. Elliott*, 1894, 21 R. 858.

a fair breeding stock of game, or limiting the numbers to be shot in the year. Such leases are protected against singular successors by the Act 1449, c. 18.¹ A deer forest is not usually also let to a pastoral tenant, as deer will not breed on land used by sheep or cattle.²

(ii) *Leases of the Right of Killing Game.*

1073. More usually it is the exclusive right of shooting or killing game on the lands which is let, saving agricultural tenants' rights to kill hares and rabbits.³ Sometimes a mansion house, with or without fishings, is let along with the game rights.

(iii) *Game Tenant's Rights and Liabilities.*

1074. There are usually clauses limiting the head of game to be killed each year, prescribing methods of shooting, as to employment of keepers, and other stipulations consistent with the purpose of the lease. It has been held that the shooting tenant is liable by implication to relieve the lessor from claims by agricultural tenants owing to an unduly large stock of game.⁴ But a game tenant is not liable, even where he is taken bound to relieve the landlord of claims, for damage for which the agricultural tenant has not claimed.⁵ The game tenant's liability to pay for damage by game rests solely on contract, and there being no privity of contract between him and the agricultural tenant, the latter cannot claim directly on the former.⁶ Power to sublet or assign requires express stipulation as there is *delectus personæ* in game leases.⁷ Scots law will regulate the construction of leases of Scottish subjects, though drawn in English form and executed in England, unless the contrary intention is expressed, or terms unintelligible to Scots lawyers are used.⁸

1075. A lease of game includes rabbits unless excluded. Therefore (apart from the Ground Game Acts⁹) neither the landlord nor anyone on his behalf may shoot rabbits without the game tenant's permission.¹⁰ How far the game tenant's right entitles him to go on the lands for purposes not directly connected with the killing of game is not clear.¹¹ A game tenant is entitled to get what he has contracted for. For example, where a subject is let as a deer forest, it is implied that not only hinds,

¹ Rankine, *Leases*, 3rd ed., p. 503; *Earl of Fife's Trs. v. Wilson*, 1859, 22 D. 191; *Farguharson*, 1870, 9 M. 66.

² See proof in *Duke of Atholl v. Macinroy*, 1862, 24 D. 673.

³ See following section; for style of such lease see *Juridical Styles*, vol. i. p. 698.

⁴ *Byrne v. Johnson*, 1875, 3 R. 255; but see *Elliott's Trs. v. Elliott*, 1894, 21 R. 858, per Lords Adam and M'Laren.

⁵ *Elliott's Trs. v. Elliott*, *supra*.

⁶ *Inglis v. Moir's Tutors*, 1871, 10 M. 204; *Kidd v. Byrne*, 1875, 3 R. 255.

⁷ *Earl of Fife v. Wilson*, 1864, 3 M. 323; *Mackintosh v. May*, 1895, 22 R. 345.

⁸ *Mackintosh v. May*, *supra*.

⁹ *North v. Cumming*, 1864, 3 M. 173.

¹⁰ See following section.

¹¹ Tait, *Game and Fishing Laws*, 2nd ed., pp. 39-40; *Lauton v. Watt* (Sh. Ct.), 1874, *Guthrie's Select Cases*, i. 280.

but stags are to be found there.¹ A lease of "exclusive" shooting rights is not fulfilled where a third party had already been given shooting rights.² A game lease does not prevent a landlord from dealing with his plantations in the ordinary course of administration, and without deliberate injury to the game rights.³ He is not, without express stipulation, obliged to keep fences round plantations in a condition to keep out animals.⁴

1076. There is no fixed rule as to the date at which rent is payable. It is usual, especially in seasonal lets, to stipulate for payment in advance.⁵ In the absence of stipulation or proof of custom as to payment in advance, sequestration of a game tenant's effects in a house let with shootings was refused.⁶

(iv) *Relations of Game and Agricultural Tenants.*

1077. While there is no privity of contract between these, and each must look to the landlord for contractual redress, a game tenant may prosecute any trespasser or other offender under any Act "authorising the institution of legal proceedings by the owner of an exclusive right to game."⁷ This may include prosecution of the agricultural tenant. The game tenant has the remedy of interdict at common law. Damage may be done to crops by game, and also by sportsmen shooting. The standard in the latter case is whether there is unnecessary damage by unreasonable or unusual conduct.⁸ If so, the farmer can recover directly from the game tenant. A person hunting on horseback, even if he is the landlord, is liable to the tenant for damage done.⁹

SECTION 7.—LANDLORD AND AGRICULTURAL TENANT.

SUBSECTION (1).—*Common Law as to Game.*

(i) *Landlord's Rights.*

1078. As between landlords and agricultural or pastoral tenants, two main principles rule: (1) That the right to kill and take game is an incident of the proprietorship; and (2) that the lands, being let for a limited purpose, must only be used by the tenant for that purpose. Occupation for agricultural or pastoral purposes cannot prevent the exercise of game rights by the landlord or some one deriving right from him. At common law, game and fishing rights are reserved to the

¹ *Earl of Wemyss v. Campbell*, 1838, 20 D. 1090.

² *Critchley v. Campbell*, 1884, 11 R. 475.

³ *Gearns v. Baker*, 1875, L.R. 10 Ch. 355; *Pattisson v. Gilford*, 1874, L.R. 18 Eq. 259.

⁴ *Patrick v. Harris's Trs.*, 1904, 6 F. 985.

⁵ See *Butter v. Foster*, 1912 S.C. 1218.

⁶ *Fraser v. Patrick*, 1879, 6 R. 581.

⁷ Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 7; see *Ferguson v. M'Nab*, 1885, 12 R. 1083.

⁸ *Hilton v. Green*, 1862, 2 F. & F. 821.

⁹ *Ronaldson v. Ballantine*, 21st November 1804, F.C.; cf. Tait's Justice of the Peace, p. 177.

proprietor, and may be leased by him to a third person. Such reserved rights, except as modified by express stipulation or statute, are a burden which the tenant must bear. He may neither take the game, nor use extraordinary means to frighten it away.¹ It has not been decided what game is included in this burden—probably the game enumerated in the Night Poaching Act.² The burden may be limited by a stipulation in the lease.³

(ii) *Tenant's Rights.*

1079. Land let for a purpose inconsistent with the exercise of game rights is free from the above burden.⁴ A proprietor may not “stake” a field to prevent netting if danger to the tenant’s servants or animals is caused.⁵ An agricultural tenant, unless the lease declares otherwise, may kill rabbits to protect his crops.⁶ But the landlord may reserve the exclusive right of killing rabbits.⁷ A reservation of “game” does not include a reservation of rabbits.⁸ A tenant may verbally authorise other persons to kill rabbits.⁸ These common law rights are not extinguished by the Ground Game Acts.⁹ The tenant may save particular fields by nets, scarecrows, or firing blank cartridges, but must not drive all the game off the farm.¹ The right to kill rabbits is not, without express stipulation, limited to the times when the crop requiring protection is actually in the ground.¹⁰ It is a question whether the common law right of a tenant to authorise another person to kill rabbits for protection of crops is open to a tenant of pasture lands common to several tenants.¹¹

(iii) *Increase in Stock of Game during Lease.*

1080. An ordinary lease contemplates a fair stock of game being on the land at the outset, and the tenant must satisfy himself as to this. To support a claim for damage by game, he must shew “a certain and visible increase” over the stock contemplated in the lease, attributable to the act of the landlord.¹² The amount of damages is the difference between damage which would have been done by an ordinary stock and that actually done. The principle applies to any alteration of the *status quo ante*, as where a landlord removed a wire netting from a

¹ *Wemyss v. Gulland*, 1847, 10 D. 204.

² See para. 1052, *supra*.

³ *Roddan v. M'Cowan*, 1890, 17 R. 1056.

⁴ *Graham v. M'Kenzie*, 1810, Hume 641; *M'Douall v. Caird*, 1869, 6 S.L.R. 583; *Welwood v. Husband*, 1874, 1 R. 507.

⁵ *Wood v. M'Ritchie* (Sh. Ct.), 1881, Guthrie's Select Cases, ii. 263.

⁶ *Moncrieff v. Arnott*, 1828, 6 S. 530; *Inglis v. Moir's Tutors*, 1871, 10 M. 204; *Brown v. Thomson*, 1882, 9 R. 1183; *Fraser v. Lawson*, 1882, 10 R. 396, per Lords Craighill and Rutherford Clark; *Jack v. Nairne*, 1887, 1 White 350.

⁷ *Richardson v. Maitland*, 1897, 2 Adam 243.

⁸ *Jack v. Nairne*, *supra*.

⁹ See para. 1089, *infra*.

¹⁰ *Crawshay v. Duncan*, 1915, 7 Adam 630.

¹¹ *Morrison v. Anderson*, 1913, 7 Adam 201.

¹² *Drysdale v. Jameson*, 1832, 11 S. 147, per Lord Fullerton; *Wemyss v. Wilson*, 1847, 10 D. 194; *Wemyss v. Gulland*, *supra*; *Morton v. Graham*, 1867, 6 M. 71; *Kidd v. Byrne*, 1875, 3 R. 255; *Cadzow v. Lockhart*, 1875, 3 R. 666.

plantation reserved in the lease, so that ground game came on to the subjects let.¹ If the plantation had not been reserved the tenant would have been entitled, under the Ground Game Acts, to protect himself by killing the ground game. It has not been decided whether at common law the occupier of land has a claim for damage to crops caused by an unreasonable stock of game kept by an adjoining proprietor.²

(iv) *Recovery of Compensation at Common Law.*

1081. A tenant has no claim for damage which he might have prevented by the ordinary exercise of his rights, *e.g.* by killing rabbits, unless he has been prevented by the landlord from exercising his right.³ Where a tenant's lease gives him the right to kill game and rabbits, there is no claim except perhaps as regards game coming from other lands.⁴ Where the lease gives no right to kill game, but does not take away the tenant's common law right to kill rabbits, he will have no claim in respect of rabbits unless the landlord alters the *status quo* as regards lands not included in the lease.⁴ Under leases to which the Ground Game Act, 1880, applies, as the tenant can kill hares or rabbits, he has no claim in respect of these unless the *status quo* is altered as regards plantations or places to which he has no access.⁵

1082. Clauses excluding claims by tenants are very strictly construed against the landlord.⁶ The tenant claiming must give timeous and sufficient notice, as evidence may be lost by *mora*.⁷ A claim is barred by payment of rent without deduction or specific reservation of the claim or a promise by the landlord.⁸ But retention of the whole rent is not warranted.⁹ The landlord may prove that the damage was not caused by the game but otherwise, *e.g.* by miscropping.¹⁰

SUBSECTION (2).—*Statutory Compensation for Damage by Game.*

(i) *Liability.*

1083. The Agricultural Holdings (Scotland) Act, 1923,¹¹ provides for compensation being paid to the tenant of a holding¹² for damage by game (deer, pheasants, partridges, grouse, and black game). "When

¹ *Cameron v. Drummond*, 1888, 15 R. 489; see *Ormston v. Hope*, 1917, 33 Sh. Ct. Rep. 128.

² See Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. c. 64), s. 9, and *Thomson v. Earl of Galloway*, 1919 S.C. 611.

³ *Wood v. Paton*, 1874, 1 R. 868; see *Gowans v. Spottiswoode*, 1914, 31 Sh. Ct. Rep. 30; *Roddan v. Pollok*, 1916, 32 Sh. Ct. Rep. 18.

⁴ *Inglis v. Moir's Tutors*, 1871, 10 M. 204.

⁵ *Cameron v. Drummond*, *supra*.

⁶ *Morton v. Graham*, 1867, 6 M. 71; *Cadzow v. Lockhart*, 1875, 2 R. 928, 3 R. 666.

⁷ *Elliott's Trs. v. Elliott*, 1894, 21 R. 858; *Emslie v. Young's Trs.*, 1894, 21 R. 710; *Broadwood v. Hunter*, 1855, 17 D. 340.

⁸ *Ibid.*; *Macdonald v. Johnstone*, 10 R. 959; *Hardie v. Duke of Hamilton*, 1878, 15 S.L.R. 329; cf. *Ramsay v. Howison*, 1908 S.C. 697.

⁹ *Meikle v. Ramsay and Todd v. Haggarty*, 1901, 17 Sh. Ct. Rep. 138 and 245.

¹⁰ *Milne v. Earl of Dalhousie*, 1868, 5 S.L.R. 268.

¹¹ 13 & 14 Geo. V. c. 10, s. 11.

¹² For definition see ss. 33, 49.

the tenant of a holding has sustained damage to his crops from game, the right to kill and take which is vested neither in him nor in anyone claiming under him other than the landlord, and which the tenant has not permission in writing to kill, he shall, subject as hereinafter mentioned, be entitled to compensation from his landlord for such damage, if it exceeds in amount the sum of one shilling per acre over which the damage extends.”¹ No contracting out of liability is allowed.²

1084. Compensation is due by the landlord even where the damage is done by game coming from another proprietor’s land during the close season.³ Where the right to kill the game is vested in some person other than the landlord, that person is liable to indemnify the landlord against claims under the section.⁴ The permission in writing, it is thought, must extend to the whole holding, but not to coverts, etc. not included in the lease, and must have been given before the damage occurred, but not necessarily in time to enable the tenant to kill off the game before the close season. In this connection *bona fides* is of importance.⁵

1085. The damage is to be measured by loss in value of the crop, not on speculative estimates of loss of seed, labour, rent, etc.⁶ If damage exceeds 1s. per acre, the whole loss is recoverable.⁷ The 1s. per acre is calculated over the area in which the damage extends, not over the whole holding.

1086. In fixing a fair rent for a croft, the Land Court may take into account the risk of damage by game.⁸ A small landholder may recover compensation in the same way as a tenant under the Agricultural Holdings Act, 1923, with the substitution of the Land Court for arbitration.⁹

(ii) *Recovery.*¹⁰

1087. Failing agreement, compensation is fixed by arbitration under the Act. The tenant on first observing damage, must give notice in writing, as soon as may be, to the landlord, and on observing further damage, a further notice. He must give the landlord a reasonable opportunity to inspect the damage (*a*) in the case of a growing crop, before it is begun to be reaped, raised, or consumed; and (*b*) when the crop has been reaped or raised, before its removal from the land is begun. A tenant should offer the landlord a time for inspection, although the statute does not expressly require such an offer.¹¹ The tenant must also give notice in writing of his claim, with particulars,¹² within one month after expiry of the calendar year, or such twelve months’ period as may be substituted for the calendar year by agree-

¹ Sec. 11 (1).

² Sec. 45.

³ *Thomson v. Earl of Galloway*, 1919 S.C. 611.

⁴ 1923 Act, s. 11 (4).

⁵ Reid, *Agricultural Holdings (Scotland) Act*, 1923, p. 69.

⁶ *Ibid.*, p. 70.

⁷ Cf. *Roddan v. M’Cowan*, 1890, 17 R. 1056.

⁸ *Crofters Holdings (Scotland) Act*, 1886 (49 & 50 Vict. c. 29), s. 6 (1); *M’Kelvie v. Duke of Hamilton’s Trs.*, 1918 S.C. 301.

⁹ *Small Landholders (Scotland) Act*, 1911 (1 & 2 Geo. V. c. 49), s. 10 (3).

¹⁰ 1923 Act, ss. 11 (2), 15–20, and Second Schedule.

¹¹ Reid, *Agricultural Holdings Act*, p. 70 n. 8, and p. 84 n. 41.

¹² Reid, App. IV. Form B2.

ment, in respect of which the claim is made. In the event of a tenant's statutory claim failing, *e.g.* for want of some notice, probably he is entitled to fall back upon his common law rights.¹

1088. A landlord may prove that, under a lease made before 1st January 1909, compensation is payable by him, or that in fixing the rent allowance was expressly made to an agreed amount for damage by game, and the arbiter is then directed to make such deduction as may appear just.² The competent proof will usually be the lease. It may be competent to inquire into the negotiations for the lease.³

SUBSECTION (3).—*The Ground Game Acts.*⁴

1089. These Acts extend largely the tenant's common law rights.⁵ Every occupier of land is given a right, inseparable from his occupancy, to kill and take "ground game" (hares and rabbits) thereon, concurrently with any other person entitled to take ground game on the same land. It is exercisable only by him, or by persons authorised by him, in writing,⁶ being (1) members of his household resident on the land, including probably visitors,⁷ (2) persons in his ordinary service on such land, or (3) any one other person *bona fide* employed for reward⁸ in taking or destroying such game. There must be not only authority, but qualification also, as above.⁹ Only the occupier and one other duly authorised person may kill ground game by firearms. The written authority must be produced when demanded by the person with the concurrent right, *e.g.* the landlord, game tenant, or person authorised by such in writing to make the demand. "Occupier" does not include persons having a right of common over the lands, or a right of pasturage for a period not exceeding nine months.¹⁰ Occupiers of moorlands and unenclosed lands (not arable) and persons authorised by them may not, under the Act, kill game except between 11th December and 31st March (inclusive).¹¹

1090. Without prejudice to his existing rights as above, the occupier may exercise his ground game rights otherwise than by the use of firearms, between 1st September and 10th December (inclusive).¹²

1091. If an occupier entitled to kill ground game otherwise than under the Acts gives that right to another, he yet retains his right under the Act, which is inseparable from occupancy.¹³ Thus the lease of sporting rights to a game tenant by a person farming his own lands does not deprive the owner of his ground game rights. All agreements purporting to divest the occupier of his ground game rights are void,¹⁴

¹ See 1923 Act, s. 46.

² 1923 Act, s. 11 (3); see *Mackay v. Wood's Trs.*, 1910, 27 Sh. Ct. Rep. 269.

³ *Cf.* s. 1 (2) (a); see *Earl of Galloway v. M'Clelland*, 1915 S.C. 1062.

⁴ 1880 (43 & 44 Vict. c. 47) and 1906 (6 Edw. VII. c. 21).

⁵ See para. 1079, *supra*.

⁶ *Richardson v. Maitland*, 1897, 2 Adam 243.

⁷ *Stuart v. Murray*, 1884, 5 Coup. 526, per Lord Justice-Clerk Moncreiff and Lord Young.

⁸ *Bruce v. Prosser*, 1897, 2 Adam 487.

⁹ *Niven v. Renton*, 1888, 1 White 578.

¹⁰ See *Brodie v. Cowie*, 1889, 5 Sh. Ct. Rep. 428.

¹¹ 1880 Act, s. 1.

¹² 1906 Act, s. 2.

¹³ 1880 Act, s. 2.

¹⁴ *Ibid.*, s. 3.

but agreements between the occupier and the owner or persons with game rights, for the joint exercise, or exercise for their joint benefit, of the right to kill ground game between 1st September and 10th December, are not struck at.¹ Rights current at the commencement of the Act of 1880 are saved.²

1092. A person lawfully exercising ground game rights does not require a game licence,³ but requires a gun licence. All persons are prohibited from using firearms for destruction of ground game at night; employing spring traps except in rabbit holes; and employing poison for destruction of ground game.⁴ Nothing in the Act authorises the taking of ground game on any days or seasons or by any methods prohibited by statute.⁵ But the landlord has been held,⁶ and the tenant is also probably, entitled to extirpate the ground game. Tenants have obtained interdict against a gamekeeper for designedly obstructing the exercise of their ground game rights.⁷

SECTION 8.—RATING, VALUATION, ETC., OF GAME RIGHTS.

1093. Shootings and deer forests are subject to valuation and rating.⁸ See VALUATION AND RATING. The possession of such subjects also enters into the question of parliamentary and local government franchise.⁸ See FRANCHISE.⁹

SECTION 9.—MISCELLANEOUS STATUTES, ETC., PROTECTING GAME.

SUBSECTION (1).—*Muirburn.*

1094. Muirburn is the periodical burning down of the heather and withered grasses on high pasture lands, for the purpose of improving the pasture. Since there is danger to adjoining woods, and to game, it requires to be regulated. It is usually so regulated in leases of pastoral farms, and is also regulated by the Heather Burning (Scotland) Act, 1926.¹⁰

1095. It is unlawful to make muirburn or set fire to any heath or muir, except before 16th April or after 30th September, with two provisos: (1) A proprietor, or his tenant authorised in writing, may make muirburn up to 30th April. (2) Where a proprietor has refused to give authority within seven days after the tenant's application for it, then if the tenant is entitled (a) under his lease, or (b) under an order of the Board of Agriculture under s. 2 of the Act, to make muirburn, he may, after notifying the proprietor, apply to the Board, which may by another order authorise the tenant to make muirburn during the whole or part of the period 16th April to 30th April inclusive, in the year to which the order under s. 2 relates, subject to the conditions in the lease or order. The Board must send a copy of any such order to the

¹ 1906 Act, s. 3. ² 1880 Act, s. 5. ³ *Ibid.*, s. 4. ⁴ See para. 1099, *infra*.

⁵ 1880 Act, s. 10. ⁶ *Park v. Goodwin*, 1886, 2 Sh. Ct. Rep. 106.

⁷ *Davidson v. Renton* (O.H.), 1903, 41 S.L.R. 134.

⁸ See Tait, Game Laws, c. vii. ⁹ Vol. VII, p. 188, *ante*. ¹⁰ 16 & 17 Geo. V. c. 30.

proprietor or his factor. For deer forests over 1500 feet above sea-level 15th May is substituted for 30th April.¹ "Tenant" is a tenant for agricultural or pastoral purposes, and includes the committee appointed under the Small Landholders (Scotland) Acts, 1886 to 1919, for common grazings. "Lease" includes regulations for a common grazing made under these Acts.

1096. The order under s. 2 is to enable a tenant to carry out necessary muirburn where he is restricted by the terms of his lease or otherwise. After giving the proprietor two weeks' notice in writing, he may apply to the Board for such an order. The Board may, after such inquiry as they think fit, and after considering parties' representations, make an order specifying the lands, and prescribing the conditions under which muirburn may be made in any year during the currency of the lease. A copy is to be sent to the proprietor. This is the order referred to in s. 1, but it may also be used at the tenant's own choice before 16th April, notwithstanding the terms of the lease. No order will justify burning at any time which would contravene s. 1 or burning contrary to the order. The Board may rescind an order contravened. In making the order the Board is to have regard to (a) the interests of the proprietor, tenant, and other persons interested, and (b) the protection of woodlands and plantations.²

1097. Contravention of s. 1 involves, on summary conviction, a maximum fine of £5 or imprisonment not exceeding thirty days, and for second and subsequent offences of £20 or three months' imprisonment. The Act applies to any fire on a muir.³ The question of what were "high and wet muirlands," formerly a difficult question of fact,⁴ is now arbitrarily solved by the Act in making a deer forest over 1500 feet high the equivalent of "high and wet moorlands."⁵ At common law, muirburn negligently carried out involves liability for damages.⁶

SUBSECTION (2).—*Egg-taking.*

1098. The eggs of wild birds are not private property until received into possession, and therefore cannot be the subject of theft. But eggs of pheasants, partridges, grouse, and black or moor game are included in "game" under the Poaching Prevention Act, 1862.⁷ Provisions relating to egg-taking are also found in the Wild Birds Protection Acts.⁸

SUBSECTION (3).—*Poison.*

1099. It is unlawful (a) to sell, offer, or expose for sale, or give away any grain or seed which has been rendered poisonous, except for *bona*

¹ 16 & 17 Geo. V. c. 30, s. 1.

² Sec. 2.

³ *Rodger v. Gibson*, 1842, 1 Broun 78, per Lord Justice-Clerk Hope at p. 111, and Lord Mackenzie at p. 113.

⁴ *Watney v. Menzies*, 1898, 36 S.L.R. 632.

⁵ 1926 Act, s. 1 (2).

⁶ *Robertson v. Duke of Atholl*, 1814, 6 Pat. 135; *Grant v. Gentle*, 1857, 19 D. 992; *Mackintosh v. Mackintosh*, 1864, 2 M. 1357.

⁷ See para. 1041, *supra*.

⁸ See para. 1102, *infra*.

fide use in agriculture; and (b) to place in or on any land or building any poison, or fluid or edible matter rendered poisonous (not sown seed or grain). The maximum penalty for doing, causing, or being a party to any of these acts is £10, on summary conviction. It is a good defence to the second charge to prove that the poison was for destroying vermin and necessary for public health, agriculture, or the preservation of other animals, domestic or wild, or for manuring the land; provided the accused took reasonable precautions to prevent access by dogs, cats, fowls, or other domestic animals.¹

1100. The Hares (Scotland) Act, 1848, expressly provides that nothing therein shall make it lawful for any person, with intent to destroy or injure hares or other game, to put any poison or poisonous ingredient on any ground, open or enclosed, where game usually resort, or on any highway.² The use of poison in the destruction of ground game is prohibited,³ under a maximum penalty, on summary conviction, of £2.

SUBSECTION (4).—*Trapping.*

1101. To prevent injury to game and to dogs, the use of spring traps, except in rabbit holes, is forbidden by the Ground Game Act, 1880.⁴ "In rabbit holes" means literally in, *i.e.* under the roof of the hole.⁴ At common law, also, traps may not be set in the open.⁵ A rabbit scrape under a wire netting is not a rabbit hole.⁶ A procurator-fiscal has the only title to prosecute.⁷ Under the Protection of Animals (Scotland) Act, 1912,⁸ a person who sets, or causes to be set, any spring trap or snare for catching hares or rabbits, or which is so placed as to be likely to do so, must ensure its being inspected at least once daily, on pain of a maximum fine of £5.

SUBSECTION (5).—*Protection of Wild Birds.*

1102. Under the Wild Birds Protection Acts, 1880 to 1904, provision is made for preventing the extinction of wild birds which are not otherwise protected by the Game Laws, or by the right of a landowner to prevent trespass. See ANIMALS.⁹ Additional statutes, with allied purposes, are undernoted.¹⁰

¹ Protection of Animals (Scotland) Act, 1912 (2 & 3 Geo. V. c. 14), s. 7.

² 11 & 12 Vict. c. 30, s. 4.

³ Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6.

⁴ *Brown v. Thomson*, 1882, 9 R. 1183.

⁵ *Ibid.*, per Lord Pres. Inglis at p. 1191.

⁶ *Fraser v. Lawson*, 1882, 10 R. 396.

⁷ *Duke of Bedford v. Kerr*, 1892, 3 White 493.

⁸ 2 & 3 Geo. V. c. 14, s. 9.

⁹ Vol. I. p. 339, *ante*; see also Tait, Game Laws, c. viii.

¹⁰ Sand Grouse Protection Act, 1888 (51 & 52 Vict. c. 55); Protection of Birds Act, 1925 (15 & 16 Geo. V. c. 31); Protection of Lapwings Act, 1928 (18 Geo. V. c. 2).

SECTION 10.—PROSECUTIONS¹ UNDER THE GAME LAWS.

SUBSECTION (1).—*Generally.*

1103. Offences under the Game Laws are either indictable or those which may be tried summarily. The only indictable offences are under the Night Poaching Acts, 1828 and 1844.² The procedure in summary prosecutions is regulated by the Summary Jurisdiction (Scotland) Act, 1908.³ Although most of the game statutes gave jurisdiction to justices of the peace, offenders must now be tried before the Sheriff or Sheriff-Substitute within whose district the offence is alleged to have been committed.⁴ No one who has once been prosecuted for certain acts as an offence under one or more of the Game Acts may again be prosecuted for the same acts as an offence under other Game Acts.⁵

1104. The prosecutor in indictable cases is His Majesty's Advocate. In summary prosecutions the procurator-fiscal is the prosecutor for all offences.⁶ Unless the Act creating the offence gives a title to someone else, he is the only prosecutor. When a private individual is given a title to prosecute for an offence where imprisonment without the option of a fine is competent, he must, unless the statute provides otherwise, have the concurrence of a public prosecutor.⁷ As a general rule prosecutions under the Game Laws are at the instance of the procurator-fiscal. Cases where others may prosecute are noted under the particular statutes *infra*, as are other specialties in the game statutes.

SUBSECTION (2).—PROSECUTIONS UNDER PARTICULAR STATUTES.

(i) *The Game (Scotland) Act, 1772.*⁸

1105. Either the procurator-fiscal or a common informer, who need not shew any interest,⁹ may prosecute. Penalties recovered go, one-half to the prosecutor, one-half to the poor or the roads. Prosecution must be instituted within six calendar¹⁰ months of the offence.¹¹

(ii) *Partridges Act, 1799.*¹²

1106. Apparently owing to an oversight, complaints must be made in H.M. Courts of Record at Westminster, and an informer, even with

¹ See CRIME, Vol. V. p. 50, *ante*.

² See Section 4, *supra*, and para. 1107, *infra*.

³ 8 Edw. VII. c. 65; see Renton and Brown, Criminal Procedure (2nd ed. by G. R. Thomson, 1928).

⁴ Game Laws Amendment (Scotland) Act, 1877 (40 & 41 Vict. c. 28), s. 10.

⁵ *Ibid.*, s. 11; cf. *Galloway v. Somerville*, 1863, 4 Irv. 444.

⁶ *Anderson and Holmes v. Cooper*, 1868, 6 M. 560; *Duke of Bedford v. Kerr*, 1893, 3 White 493, per Lord Adam.

⁷ Summary Jurisdiction (Scotland) Act, 1908, s. 18.

⁸ 13 Geo. III. c. 54, ss. 8, 10; see Section 2, *supra*.

⁹ *Gray v. Bonnar*, 23rd January 1816, F.C., App. I.

¹⁰ *Farquharson v. Whyte*, 1886, 1 White 26.

¹¹ 1772 Act, s. 14.

¹² 39 Geo. III. c. 34; see Section 3, *supra*.

concurrence of the procurator-fiscal, has no title to prosecute in Scotland.¹ It is a question whether a procurator-fiscal may take proceedings under the Act.

(iii) *Night Poaching Acts, 1828 and 1844.*²

1107. Indictable offences under these Acts may now be tried in the Sheriff Court, and not only in the High Court of Justiciary.³ Where on indictment the accused was charged with a third offence under s. 1 of the Act of 1828, an objection that the previous convictions both bore to be first convictions was repelled.⁴ It is competent in the same indictment to charge a breach of s. 2 of the 1828 Act (offenders offering violence), and an assault at common law, but questionable whether conviction for both charges can competently follow on proof of the same *species facti*.⁵ Indictment must be made within twelve months after commission of the offence.⁶ Where there is not a substantive charge of a second offence, but a previous conviction is libelled as an aggravation, it may not be proved *in causa*.⁷ The High Court of Justiciary has no jurisdiction to try a first offence under these Acts.⁸ A complaint charging "an offence within the meaning of the Night Poaching Act, 1828, particularly s. 1 thereof, and of the Night Poaching Act, 1844, s. 1," sufficiently charges an offence under both statutes, the second being explanatory of the first.⁹

(iv) *Day Trespass Act, 1832.*¹⁰

1108. Prosecutions under s. 2 may be at the instance of the owner or occupier of the land, or the procurator-fiscal. It has been held to follow that owners and occupiers have a title to prosecute in any breach of the Act.¹¹ According to the nature of the punishment, the concurrence of the procurator-fiscal will, or will not, be required.¹² The Ground Game Act extends this title to a person with the exclusive right of killing game on the lands.¹³

1109. The complaint may be signed by a properly authorised law agent,¹⁴ who may represent the prosecutor at the trial. It must be in

¹ *M'Douall v. Irvine*, 1908 S.C. 60.

² 9 Geo. IV. c. 69, s. 7, and 8 Vict. c. 29. See Section 4, *supra*.

³ Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), s. 56.

⁴ *Bird*, 1865, 5 Irv. 75.

⁵ *H.M. Advocate v. Puller*, 1870, 1 Coup. 398.

⁶ 1828 Act, s. 4; *M'Nab*, 1845, 2 Broun 416.

⁷ *M'Dermott v. Stewart's Trs.*, 1918 J.C. 25.

⁸ *Rowet*, 1843, 2 Broun 540; *Robinson*, 1844, 2 Broun 176.

⁹ *Kinnear v. Whyte*, 1868, 1 Coup. 56.

¹⁰ 2 & 3 Will. IV. c. 68. See Section 4, *supra*.

¹¹ *Ferguson v. Macnab*, 1885, 12 R. 1083, per Lord Fraser at p. 1086; *Russell v. Colquhoun*, 1845, 2 Broun 572.

¹² See para. 1104, *supra*.

¹³ 43 & 44 Vict. c. 47, s. 7; *Ferguson v. Macnab*, *supra*.

¹⁴ *Shaw-Stewart v. Wilson*, 1881, 4 Coup. 455.

writing.¹ An oath of verity by the informer is no longer necessary.² All prosecutions must be commenced within three calendar months after the offence.³ In a prosecution under s. 1, the prosecutor may limit his claim to the lesser penalty of £2, even in prosecuting five trespassers acting together, a case where the maximum penalty is £5.⁴

(v) *Poaching Prevention Act, 1862.*⁵

1110. Penalties under this Act may be recovered in the same manner as penalties under the Act of 1832. This gives the same persons the right to prosecute as under that Act.⁶ The constable or peace officer apprehending the offender may also prosecute.⁷ The complainer under this Act must take an oath of verity.⁸ A conviction of "the contravention charged" is good.⁹

(vi) *Ground Game Act, 1880.*¹⁰

1111. Any person who, not being in the occupation of land, *e.g.* a tenant of shooting rights only, but who has the sole right of killing game thereon, has the authority to institute proceedings under any Act which is given to the owner of an exclusive right to kill game.¹¹ An agricultural tenant has no title to institute prosecutions under the Ground Game Acts for anything but offences which are also invasions of his individual rights. The public prosecutor alone may prosecute in public offences. His concurrence will not validate a prosecution at the instance of a private individual in such cases.¹²

¹ *Mackenzie v. Maberly*, 1859, 3 Irv. 459.

² 1832 Act, s. 11, as in part rep. by Statute Law Revision Act, 1891.

³ Sec. 11. Cf. Summary Jurisdiction (Scotland) Act, 1908, s. 26.

⁴ *Saunders v. Paterson*, 1905, 4 Adam 568.

⁵ 25 & 26 Vict. c. 114. See Section 4, *supra*.

⁶ *Anderson v. Cooper*, 1868, 1 Coup. 18.

⁷ 1862 Act, s. 2.

⁸ *M'Donald v. Milne*, 1897, 2 Adam 457.

⁹ *Scott v. Anderson*, 1868, 1 Coup. 98.

¹⁰ 43 & 44 Vict. c. 47.

¹¹ *Ibid.*, s. 7; *Ferguson v. Macnab*, 1885, 12 R. 1083.

¹² *Duke of Bedford v. Kerr*, 1893, 3 White 493.

GAMING, BETTING, AND LOTTERIES.

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PART I.—CIVIL.

SECTION I.—DEFINITION OF GAMING.

1112. Gaming or gambling is to play at a game of chance for a stake; it is to play with a view to win money or other thing wagered on the issue. A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event: the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way.¹ To constitute gaming the game must be one which involves the element of wagering; each player must have a chance of losing as well as of winning.² Lord Trayner³ did not think the Gaming Act, 1853,⁴ meant to distinguish between the different

¹ Anson, Law of Contract, 16th ed., p. 230.

² *Lockwood v. Cooper*, [1903] 2 K.B. 428.

³ In *Duff v. Neilson*, 1892, 20 R. (J.) 33; 3 White, 399.

⁴ 16 & 17 Vict. c. 119, extended to Scotland by the Betting Act, 1874 (37 & 38 Vict. c. 15).

purposes of gaming and betting. Lord Skerrington, however, gave it as his opinion that in ordinary language a distinction is drawn between betting on the one hand and playing games in which money is staked on the other hand. The distinction, he said, may not be logical, but it is convenient and practical.¹ The essence of both is, however, wagering.

SECTION 2.—GENERAL RULE OF LAW.

1113. Subject to certain qualifications, the attitude of the common law of Scotland towards bets and wagers may be summed up thus: "Courts of Justice were instituted to enforce the rights of parties arising from serious transactions and can pay no regard *sponsionibus ludicris*."² A *sponsio ludicra* is defined as a matter not serious enough to occupy the attention of the Court.³ This is a well-settled doctrine,⁴ and wagering and gaming contracts are regarded as milder, and lotteries as a grosser species of the genus *pactum illicitum*.⁵ The practical effect is that no action lies to compel payment of money lost, *e.g.* at cards, and the Court will not sustain an action for a bet or allow inquiry into the result of a race.⁶ A payment in the form of a cheque to a winner at gaming is void, and no action can lie on the cheque if it is dishonoured.⁷ Where, also, an agreement to refer betting disputes to a particular arbitrator is an integral part of the bargain by which the bets are made, the agreement to refer is itself a contract by way of gaming or wagering and is unenforceable.⁸ If, however, the result of a race is admitted the stakeholder must pay to the winner.⁹ On the other hand, no action lies for repayment of money so lost and voluntarily relinquished.¹⁰ The maxim *ex pacto illicito vel turpi causa non oritur actio* holds good.¹¹ A simple averment that money was won by cheating will not ground an action for repetition, unless facility and circumvention or some similar ground is also averred.¹² The same rules apply to lotteries, which have been defined as "distribution of prizes by lot or chance."¹³ But where one party to a wager has staked money with a stakeholder he would seem to be entitled to recover it

¹ In *Granata v. Mackintosh*, 1916 S.C. (J.) 48; cf. *Keep v. Stevens*, 1909, 100 L.T. 491.

² *Wordsworth v. Pettigrew*, 1799, Mor. 9524; *Knight v. Stott*, 1892, 19 R. 959.

³ *Graham v. Pollock*, 1848, 10 D. 646, per Lord Mackenzie at p. 648.

⁴ *O'Connell v. Russell*, 1864, 3 M. 89.

⁵ Morison's Dict., *sub voce* "Pactum Illicitum"; Bell, Com., 5th ed., p. 300; Bell, Convey. i. 156.

⁶ *O'Connell v. Russell*, *supra*; cf. *Christison v. M'Bride*, 1881, 9 R. 34.

⁷ *Richardson v. Moncrieffe*, 1926, 43 T.L.R. 32.

⁸ *Lee, Ltd. v. Lord Dalmeny and Ors.*, 1926, 43 T.L.R. 119; cf. *Hyde v. Tyler*, 1926, 42 T.L.R. 652.

⁹ *Cadder v. Stevens*, 1871, 9 M. 1074.

¹⁰ *Paterson v. Macqueen and Kilgour*, 1866, 4 M. 602, per Lord Deas at p. 607; *Bruce v. Ross*, 1787, Mor. 9523; *Gordon v. Campbell*, 1804, Mor. *voce* "Pactum Illicitum," App. i. 8.

¹¹ But see *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K.B. 1080.

¹² *Paterson v. Macqueen*, *supra*.

¹³ *Taylor v. Smetten*, 1882, 11 Q.B.D. 207, per Hawkins J. at p. 210; see also *Christison v. M'Bride*, *supra*; *M'Laren v. M'Manus*, 1878, 2 Guthrie's Sh. Ct. Ca., 105; *Sykes v. Beadon*, 1879, 11 Ch. D. 170; *Barclay v. Pearson*, [1893] 2 Ch. 154.

from the depositary, so long as it has not actually been paid over to the winner,¹ and this is not affected by the Gaming Act, 1892.² By the Gaming Act, 1853,³ money received as a deposit on a bet by the keeper of any house, office, room, or place used for betting may be recovered. Where gaming debt is pleaded as a defence to liability on a bond or bill, particular specification of time, place, and circumstances must be made.⁴

1114. In England when a gambling debt is sued for, the Court will take notice of the fact *ex proprio motu* even although the Gaming Acts are not pleaded in defence,⁵ and the same attitude was taken in the Outer House of the Court of Session.⁶

SECTION 3.—LIMITATION OF GENERAL RULE.

1115. Although the Court will not decide who is the winner of a competition, nor enter into a consideration of the rules of a game for the purpose of determining whether deceit or foul play has been used to secure the victory, yet if, after the race has been run or the game played and the winner decided, any question of law should arise in regard to the patrimonial rights of parties, the Court will not refuse to entertain it. The fact that the relation in which the parties are is due to a *sponsio ludicra* will not debar it from so doing; nor is it an objection that these rights cannot be determined without an examination of the rules of the game.⁷ Thus an action will lie against the custodian of a prize or the holder of the stakes of a race for delivery or payment to the declared winner. The Court will not decide whose duty it is to declare the winner. Nor will any matters relating to the conduct of the game or the agreement of parties be reviewed by the Court.⁸ The Court will consider the rights of parties under a joint adventure for purposes of speculation when the contract as between the parties is not a gaming transaction,⁹ but money paid in respect of agreement by way of gaming is void.¹⁰ The contract of insurance is essentially of the nature of a wagering contract, but, except in the case of what is known as wagering policies (see INSURANCE), is not so regarded by the law; such a contract is not *sponsio ludicra*.¹¹ Money lent to pay gambling debts may be recovered.¹²

¹ *Diggle v. Higgs*, 1877, 2 Ex. D. 422; *Trimble v. Hill*, 1879, 5 App. Cas. 342.

² 55 & 56 Vict. c. 9; *O'Sullivan v. Thomas*, [1895] 1 Q.B. 698; *Burge v. Ashley & Smith, Ltd.*, [1900] 1 K.B. 744.

³ 16 & 17 Vict. c. 119, s. 5.

⁴ *Don v. Richardson*, 1858, 20 D. 1138.

⁵ *Lockett v. Wood*, 1908, 24 T.L.R. 617; *Blyth v. Hulton & Co., Ltd.*, 1908, 24 T.L.R. 719.

⁶ *Hamilton v. M'Lauchlan* (O.H.), 1908, 16 S.L.T. 341.

⁷ *Paterson v. Macqueen and Kilgour*, 1866, 4 M. 602; *Calder v. Stevens*, 1871, 9 M. 1074; *Noble v. M'Intyre*, 1889, 5 S.L.R. 199.

⁸ *Graham v. Pollock*, 1848, 10 D. 646; *O'Connell v. Russell*, 1864, 3 M. 89; *Calder v. Stevens*, *supra*.

⁹ *Mollison v. Noltie*, 1889, 16 R. 350; cf. *Jeffrey & Co. v. Bamford*, [1921] 2 K.B. 351.

¹⁰ *Saffery v. Mayer*, [1901] 1 K.B. 11.

¹¹ *Wordsworth v. Pettigrew*, 1799, Mor. 9524.

¹² *Hopkins v. Baird* (O.H.), 1920, 2 S.L.T. 94; cf. *Foot v. Baker*, 1843, 6 Scott N.R. 301; *Moulis v. Owens*, [1907] 1 K.B. 746.

1116. In England the defence of the Gaming Acts is sometimes successfully rebutted, where the plaintiff argues that he is not suing upon a gaming debt, but upon a fresh engagement of the defendant to pay the amount of the gaming debt, the consideration being a forbearance on the part of the creditor by giving time or refraining from exposing defendant's failure to pay.¹ In Scotland, however, the Court would probably require to be satisfied that the fresh engagement was free from the objection of *sponsio ludicra*, the English objection being purely a statutory one.

SECTION 4.—EARLY LEGISLATION.

1117. The first Scots Act which deals with the subject of gaming and betting is 1621, c. 14. That Act provides that if more than one hundred merks be won at cards or dice within twenty-four hours, or more than that sum be won within the same period at wagering on horse races, the surplus is to belong to the kirk session of the parish where it was won, to be used for the poor of the parish. The last reported case in which effect was given to this statutory provision was in 1774.² In 1864 Lord Deas expressed the opinion that the Act was not in desuetude, and would still be enforced.³

1118. The Act, 9 Anne, c. 14, which has been made the basis of decision in Scotland,⁴ provides that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming . . . or by betting on the sides or hands of such as do game . . . shall be utterly void, frustrate and of none effect." It was accordingly held that bills and bonds granted for a gaming debt were void even in the hands of an onerous indorsee.⁵ But this Act is repealed by the Gaming Act, 1835,⁶ in so far as it provides that "any note, bill or mortgage shall be absolutely void." The effect of such bills and notes is now regulated by the Bills of Exchange Act, 1882.⁷ This does not affect the case of a personal bond, but the onerous assignee may sue for repetition of what he has paid for the assignation on the ground of the implied warrandice *debitum subesse*.⁸

¹ *Hyams v. Stuart King*, [1908] 2 K.B. 696; *Dey v. Mayo*, [1920] 2 K.B. 346; *Sutters v. Briggs*, [1922] 1 A.C. 1; cf. *Jeffrey & Co. v. Bamford*, [1921] 2 K.B. 351.

² *Maxwell v. Blair*, 1774, Mor. 9522.

³ *O'Connell v. Russell*, 1864, 3 M. 89; cf. *Calder v. Stevens*, 1871, 9 M. 1074, per Lord Justice-Clerk Moncreiff; *Park v. Sommerville*, 1668, Mor. 3459; *Straiton v. Craigmillar*, 1688, Mor. 9506; Bell, Com. i. 300.

⁴ *M'Coul v. Braidwood*, 1767, Mor. 9518.

⁵ *Elliott v. Cocks & Co.*, 1826, 5 S. 40; *Hamilton v. Russell*, 1832, 10 S. 549.

⁶ 5 & 6 Wm. IV. c. 41, as amended by 37 & 38 Vict. c. 35; 53 & 54 Vict. c. 51; and 12 & 13 Geo. V. c. 19; and see *Cohen v. Hall*, 1921, 38 T.L.R. 150; *Rayner v. Kent & Stansfield* (O.H.), 1922, S.L.T. 331.

⁷ 45 & 46 Vict. c. 61, ss. 27, 29, 30, and 38.

⁸ *Ferrier v. Graham's Trs.*, 1828, 6 S. 818.

SECTION 5.—WAGERING ON DIFFERENCES.

1119. A not uncommon form of wagering is what is known as “time bargains” or “contracts for differences.” The reported cases refer almost exclusively to transactions on the Stock Exchange, but there is no distinction between wagering on the prices of stocks and shares and wagering on the prices of wheat, iron, or any other commodity. There may be gambling where there is no gaming, and one who has entered into a transaction as a mere speculator is not debarred thereby from maintaining an action, provided he does not found upon a wagering contract.¹ “A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the view of the purchaser, a gambling transaction, or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock—if he means to sell again before the settling day arrives—that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned, and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both parties to it.”² To constitute a wagering contract these elements are necessary: there must be two parties, opposed to each other, directly or through the intermediary of brokers, of whom one must lose; both must intend the transaction to be fictitious, neither being bound to give or accept delivery of the stock, shares, or goods.³ The question whether the transactions are real or fictitious is one to be proved by evidence.

1120. The fact that the contract is in writing and *ex facie* enforceable is not conclusive of its reality, nor is it necessarily fictitious if no delivery has followed or was expected to follow, but only payment of differences.⁴ “No doubt if it could be shewn that there was a sub-contract or latent understanding that the contract for delivery of stock was not to be enforced, then the case would result in a contract for differences . . . and again, if there be an obligation legally enforceable to deliver stock, the mere circumstance that the speculator in his own mind does not need to enforce the contract, but is content to take his differences when offered to him, will not make the contract one for differences

¹ *Mollison v. Nollie*, 1889, 16 R. 350.

² Dictum of Cave J. approved in *The Universal Stock Exchange, Ltd. v. Strachan*, [1896] A.C. 166; *Barnett v. Sanker*, 1925, 41 T.L.R. 660.

³ *Boyd v. Law*, 1855, 17 D. 513; *Foulds v. Thomson*, 1857, 19 D. 803; *Thacker v. Hardy*, 1878, 4 Q.B.D. 685; *Risk v. Guild*, 1881, 8 R. 729; *Newton v. Cribbes*, 1884, 11 R. 554; *Heiman v. Hardie & Co.*, 1885, 12 R. 406; *Gillies v. M'Lean*, 1885, 13 R. 12; *Shaw v. Caledonian Rly. Co.*, 1890, 17 R. 466; *Liqr. of The Universal Stock Exchange Co., Ltd. v. Howat*, 1891, 19 R. 128; *Mole v. Turner*, 1894, 2 S.L.T. 365; *The Universal Stock Exchange, Ltd. v. Strachan*, *supra*; *In re Gieve*, [1899] 1 Q.B. 794; *Philp v. Bennett & Co.*, 1901, 18 T.L.R. 129; *Lamond v. Inglis (O.H.)*, 1903, 11 S.L.T. 10; *Ironmonger & Co. v. Dyne*, 1928, 48 T.L.R. 497.

⁴ *Shaw v. Caledonian Rly. Co.*, *supra*.

which the law would refuse to enforce.”¹ A contract to deal in differences only may be proved by a course of transactions which clearly shews that such was the real agreement of parties.²

1121. If the Court is satisfied that what it is dealing with is a wagering contract it will not consider the case at all, although the contract is one to be construed by the law of another country, under which it is valid and enforceable.³

PART II.—CRIMINAL.

SECTION 1.—POLICY OF THE LEGISLATION.

1122. Gaming and wagering or betting are not in themselves crimes. Playing at games of cards for money is gaming which is not necessarily unlawful, but it is unlawful if the games are played in a common gaming house as part of the business thereof.⁴ It has, however, been the policy of the law, especially since the earlier part of the nineteenth century, to prohibit gaming and wagering under certain circumstances in the interests of public morality and for the suppression of dishonesty and nuisance.

1123. “The legislature has not prohibited betting at all, but prohibited a house for betting.”⁵ “It is not illegal to bet, but it is illegal to keep a betting house.”⁶ Houses where games of chance are commonly played for money for the benefit of the keeper of such houses are illegal at common law.⁷ Where, however, games of skill are played different considerations apply. Games played for a money stake do not necessarily involve betting, and such games do not fall within the scope of the Betting Act, 1853, merely because it is a rule of the game that a member of the public who desires to play must begin by depositing his stake. The making of such deposits in no way affects or alters the true character of the game.⁸ The Act of 1853⁹ deals exclusively with betting and wagering in the ordinary sense; with betting pure and simple; in other words, with bets in respect of future contingencies or results of horse races and the like.¹⁰ The Gaming Machines (Scotland) Act, 1917,¹¹ however, strikes in absolute terms at the use in any shop, office, room, or place of any machines for the purpose of gaming.

¹ *Shaw v. Caledonian Rly. Co.*, 1890, 17 R. 466, per Lord M'Laren at p. 482.

² *Heiman v. Hardie & Co.*, 1885, 12 R. 406; *The Universal Stock Exchange, Ltd. v. Strachan*, *supra*.

³ *Heiman v. Hardie & Co.*, *supra*.

⁴ *Jenks v. Turpin*, 1884, 13 Q.B.D. 505, per Hawkins J. at p. 513.

⁵ *Powell v. Kempton Park Racecourse Co. Ltd.*, [1899] A.C. 143, per Lord Halsbury.

⁶ *Johnstone v. Abercrombie*, 1892, 20 R. (J.) 37; 3 White 432, per Lord Justice-General Robertson at p. 441.

⁷ *Granata v. Mackintosh*, 1916 S.C. (J.) 48, per Lord Skerrington at p. 53; *Greenhuff*, 1832, 2 Swin. 236.

⁸ *Granata v. Mackintosh*, *supra*.

⁹ 16 & 17 Vict. c. 119.

¹⁰ *R. v. Hobbs*, [1898] 2 Q.B. 647, per Russell C.J., at p. 675; *Granata v. Mackintosh*, *supra*.

¹¹ 7 & 8 Geo. V. c. 23.

1124. The Act 1621, c. 14, provides "that no man shall play at cards nor dyce in any common house, town, hostelrie or cookes houses under the pain of £40 money of this realme, to be exacted of the keeper of the said inns or common houses for the first fault and losse of their liberties for the next." This statute was invoked as late as 1889,¹ but now modern statutes are invariably founded on in betting prosecutions.

SECTION 2.—MODERN BETTING LEGISLATION.

1125. The principal statutes against betting are (1) the Betting Acts of 1853² and 1874,³ the latter of which, *inter alia*, extended the provisions of the former to Scotland; (2) the Burgh Police (Scotland) Acts, 1892⁴ and 1903;⁵ (3) the Street Betting Act, 1906;⁶ (4) the Ready Money Football Betting Act, 1920;⁷ (5) the Gaming Machines (Scotland) Act, 1917;⁸ and (6) the Racecourse Betting Act, 1928.⁹ Swindling under the guise of gaming is dealt with by the Prevention of Gaming (Scotland) Act, 1869,¹⁰ and the Burgh Police (Scotland) Act, 1892.⁴ The penalty under both statutes is imprisonment without alternative. The Gaming Acts, 1845,¹¹ and 1892¹² do not apply to Scotland.¹³

SECTION 3.—BETTING HOUSES AND PLACES.

SUBSECTION (1).—*The Betting Act, 1853.*

1126. The Betting Act, 1853, enacts that it is illegal to open, keep, or use a house, office, room, or other place for the purpose of the owner, occupier, or keeper, or any person using the same or others on their behalf, or of any person having the care or management or in any manner conducting the business thereof, (1) betting with persons resorting thereto, or (2) receiving money or valuable thing as the consideration of any assurance, undertaking, promise, or agreement to pay or give themselves, or by some other person thereafter, any money or valuable thing on any event or contingency of or relating to any horse or other race, fight, game, sport, or exercise. A betting house is declared to be a common nuisance, and it is illegal to advertise it. The keeping of such a house is penalised, and the receiving of deposits on bets is forbidden, as is the giving of any acknowledgment, note, security, or draft on receipt entitling any person to payment of any money on a betting contingency.¹⁴

SUBSECTION (2).—*What is a "Place"?*

1127. A betting *locus* is a "place" when it is used in the same way as a house or apartment would be used for the purpose of betting;

¹ *Hoggan v. Wood*, 1889, 16 R. (J.) 95; 2 White 282.

² 16 & 17 Vict. c. 119.

³ 37 & 38 Vict. c. 15. See *Hart v. M'Creadie*, 1899, 2 F. (J.) 1.

⁴ 55 & 56 Vict. c. 55, s. 406.

⁵ 3 Edw. VII. c. 33, s. 51.

⁶ 6 Edw. VII. c. 43.

⁷ 10 & 11 Geo. V. c. 50.

⁸ 7 & 8 Geo. V. c. 23.

⁹ 18 & 19 Geo. V. c. 41.

¹⁰ 32 & 33 Vict. c. 87.

¹¹ 8 & 9 Vict. c. 109.

¹² 55 & 56 Vict. c. 9.

¹³ *Levy v. Jackson*, 1903, 5 F. 1170.

¹⁴ 16 & 17 Vict. c. 119, s. 4.

it is any place that is sufficiently localised and definite and in which a betting establishment might be conducted.¹ The Betting Act of 1853 deals with persons who are in control and occupation of a place which is assumed to be a betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business struck at is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment.² The term "place" thus falls within the *genus idem* of the preceding words house, office, or room when it is used in the same manner.³ It is the localisation of a betting business that is prohibited.⁴ A "place" need not be roofed and may be to some extent open, but yet be a place where a man, according to ordinary usages, would be found.⁵ The term includes any place of public resort.⁶ The following have been held to be places: a wooden baize-covered structure;⁷ a large fixed umbrella with a name printed on it;⁸ a hoarding;⁹ a stool or box close to a cane structure, five feet high, with four supports;¹⁰ an archway in a street habitually used by a bookmaker;¹¹ a pit heap one-eighth of an acre in extent, bounded by buildings and hoardings and a row of houses;¹² a timber yard;¹³ a railway station; the bar of a public-house used by a bookmaker for taking bets, with the approval, connivance, or tolerance of the licence holder¹⁴ (there must, however, be knowledge, real or constructive, on the part of the licence holder¹⁵); a shop containing a gaming automatic machine;¹⁶ a room used by a bookmaker for settling betting accounts only.¹⁷ Under the Burgh

¹ *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143; [1897] 2 Q.B. 242; *Stoddart v. Hawke*, [1902] 1 K.B. 353, per Channell J. at p. 360; cf. *Henretty v. Hart*, 1885, 13 R. (J.) 9; 5 Coup. 703; *Liddell v. Lofthouse*, [1896] 1 Q.B. 295; *Thwaites v. Coulthwaite*, [1896] 1 Ch. 496; *Flannagan v. Hill*, 1904, 7 F. (J.) 26; 4 Adam 480; *Clark v. Dykes*, 1906, 8 F. (J.) 43; 5 Adam 17; *Young v. Neilson*, 1893, 20 R. (J.) 62; 3 White 487; *Airton v. Scott*, 1906, 79 J.P. 148.

² *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143, per Lord Halsbury at p. 159; cf. *Bond v. Plumb*, [1894] 1 Q.B. 169; [1895] 2 Ch. 202; *R. v. Worton*, [1895] 1 Q.B. 227.

³ *Powell v. Kempton Park Racecourse Co., Ltd.*, [1897] 2 Q.B. 242, per Smith L.J. at p. 276.

⁴ *Stoddart v. Hawke*, [1902] 1 K.B. 353, per Channell J. at p. 360.

⁵ *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143, per Lord James of Hereford at p. 194.

⁶ *Kitson v. Ashe*, [1899] 1 Q.B. 425.

⁷ *Shaw v. Morley*, 1868, 3 Ex. 137.

⁸ *Bows v. Fenwick*, 1874, L.R. 9 C.P. 339.

⁹ *Liddell v. Lofthouse*, *supra*.

¹⁰ *Brown v. Patch*, [1899] 1 Q.B. 892.

¹¹ *R. v. Humphrey*, [1899] 1 Q.B. 875.

¹² *M'Inaney v. Hildreth*, [1897] 1 Q.B. 600.

¹³ *R. v. Cranny*, 1900, 63 J.P. 826.

¹⁴ *Belton v. Busby*, [1899] 2 Q.B. 380; *Tromans v. Hodgkinson*, [1903] 1 K.B. 30; *R. v. Simpson*, [1903] 1 K.B. 468; *R. v. Deaville*, [1903] 1 K.B. 468; *Kitson v. Ashe*, *supra*; *Hornsby v. Raggett*, [1892] 1 Q.B. 20; *R. v. Mean*, 1904, 69 J.P. 27; *Buxton v. Scott*, 1909, 100 L.T. 390; *Dryden v. Mackay*, 1924, J.C. 67.

¹⁵ *Bosley v. Davies*, 1875, 1 Q.B.D. 84; *Avards v. Dance*, 1862, 26 J.P. 437; *Redgate v. Haynes*, 1875, 1 Q.B.D. 89; *Somerset v. Hart*, 1884, 12 Q.B.D. 360; *Crabtree v. Hole*, 1879, 43 J.P. 799; *Bond v. Evans*, 1888, 21 Q.B.D. 249; *Dryden v. Mackay*, *supra*.

¹⁶ *Fielding v. Turner*, [1903] 1 K.B. 867; *Thompson v. Mason*, 1904, 68 J.P. 290; *Roberts v. Harrison*, [1909], W.N. 163.

¹⁷ *Hodgson v. Macpherson*, 1913 S.C. (J.) 68; 7 Adam 118.

Police (Scotland) Act, 1892,¹ a "place" has been held to include an open-air yard, enclosed by walls six feet high, entered by a door with a lock, and although designed for quoiting, used primarily for betting;² and an enclosure 1100 square yards in extent, designed for quoiting but used primarily for betting, and resorted to for that purpose.³

1128. The Betting Act, 1853, deals with persons who are in control and occupation of a place in which the business of betting is conducted either by the person in control himself or by others with his permission. Premises do not become a "place" if the person in control is unaware actually or constructively that betting is taking place therein.⁴ A person in the position of a trespasser has been held to commit no offence while engaged in bookmaking.⁵ The immunities of persons betting in a public place are, however, considerably curtailed by the Street Betting Act, 1906.⁶ Special privileges are attached to credit betting. Racecourses have been subject to legal interpretation with reference to the Gaming Act, 1853,⁷ and have received special statutory attention. Racecourses for horse-racing are regulated as regards betting by the Street Betting Act, 1906,⁶ and the Racecourse Betting Act, 1928,⁸ depending on whether or not they are "approved" in terms of the 1928 Act.

SUBSECTION (3).—*Premises which are not "Places."*

(i) *Premises used for Credit Betting.*

1129. Premises are not a betting house or place within the meaning of the Betting Act, 1853,⁷ when the whole business is done by means of letters, telegrams, or telephone messages, and no money is received by the person in control or occupation before the event on which the bet is made has been decided.⁹ In other words, credit betting is lawful when unaccompanied by physical resorting.¹⁰

(ii) *Racecourses.*

1130. The owner of a racecourse is not guilty of an offence (*i.e.* the offence of keeping a place for the purpose of any person using it betting with persons resorting thereto) even although he knows (but has no interest in the matter) that betting is taking place there between book-makers and members of the public, all of whom have paid the same

¹ 55 & 56 Vict. c. 55, s. 407.

² *Flannagan v. Hill*, 1904, 7 F. (J.) 26; 4 Adam 480.

³ *Clark v. Dykes*, 1906, 8 F. (J.) 43; 5 Adam 17.

⁴ *R. v. Moss*, 1910, 26 T.L.R. 323.

⁵ *R. v. Moss*, *supra*; *Wright v. Smith*, 1903, 6 F. (J.) 18; 4 Adam 316; *Vallance v. Campbell*, 1906, 8 F. (J.) 62; 5 Adam 70.

⁶ 6 Edw. VII. c. 43; see para. 1146 *et seq.*, *infra*.

⁷ 16 & 17 Vict. c. 119.

⁸ 18 & 19 Geo. V. c. 41.

⁹ *Traynor v. Macpherson*, 1911 S.C. (J.) 54; 6 Adam 407; *Auld v. Logan*, 1920, J.C. 70.

¹⁰ See para. 1136, *infra*.

admission charges, and that some of them have resorted to it for the purpose of betting as well as seeing the racing.¹

1131. Racecourses for horse-racing and ground adjacent thereto may become "approved" under the Racecourse Betting Act, 1928,² and when a certificate of approval has been granted in terms of the Act they are not "places" within the meaning of the Act of 1853,³ and the laws against resorting do not apply. To obtain these privileges, however, the betting must be conducted within the place, whether a building or not, provided for the purpose,⁴ and it must take place on the days on which horse and no other races take place thereon.⁵ An approved racecourse may be provided with a totalisator or other mechanical contrivance for betting.⁶

1132. A racecourse for horse-racing that has not been approved in terms of the Racecourse Betting Act, 1928,⁷ although a public place, retains privileges under the Street Betting Act, 1906.⁷ By the latter Act, frequenting or loitering in a racecourse for horse-racing, or ground adjacent thereto for the purpose of bookmaking or betting, is not an offence if these acts are done on the days on which racing takes place.⁸ An enclosed field to which the public have restricted access and where some horse races, but chiefly athletic events, are contested, does not fall under the exemption in favour of racecourses conferred by the Act.⁹

(iii) *Clubs.*

1133. It has been held that members of a *bona fide* social club may bet with one another in the club premises if the betting is merely incidental to their meeting in the club. Where, however, a portion of the club is kept and used for the purpose of betting, constituting an abuse of the rules and objects of a social club, the place has no privilege.¹⁰

(iv) *Premises where Games are Played.*

1134. It is more than doubtful if there are any unlawful games in Scotland. In any event, a game does not become illegal by being played for a stake, say dominoes for a prize contributed for by the players, or whist for a prize given by a third party.¹¹ Where, however, there is a charge for admission and prizes are offered, playing for stakes is an offence under the Act of 1853.¹² The question whether a game

¹ *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143; *Dryden v. Mackay*, 1924, J.C. 67.

² 18 & 19 Geo. V. c. 41.

⁴ 18 & 19 Geo. V. c. 41, s. 3 (2).

⁶ *Ibid.*, s. 1 (2) (a) and 1 (3) (a).

⁸ 6 Edw. VII. c. 43, s. 4.

³ 16 & 17 Vict. c. 119.

⁵ *Ibid.*, s. 1 (1) and (2) (b).

⁷ *Supra.*

⁹ *Walker v. Reid*, 1911 S.C. (J.) 41; 6 Adam 358.

¹⁰ *Downes v. Johnson*, [1895] 2 Q.B. 203; cf. *Jackson v. Roth*, [1919] 1 K.B. 102.

¹¹ *Hoggan v. Wood*, 1889, 16 R. (J.) 95; 2 White 282; *Lockwood v. Cooper*, [1903] 2 K.B. 428; contrast *Jenks v. Turpin*, 1884, 13 Q.B.D. 505; *R. v. Ashton*, 1852, 1 E. and B. 286; *Welton v. Ruffles*, [1920] 1 K.B. 226.

¹² *Bennett v. Ewens*, 1928, 44 T.L.R. 545; cf. *Morris v. Godfrey* (C.C.A.), 1912, 28 T.L.R. 401; *R. v. Hendrick*, 1921, 37 T.L.R. 447.

is unlawful under the Act of 1853¹ has been held in England to be a question of fact for the jury.²

SUBSECTION (4).—*Resorting.*

1135. To constitute a betting house or place there must be either physical resorting by persons, or the receipt of money or other valuable thing as the basis of the covenant to pay,³ unless the fact that the house is a betting house is proved by other evidence, such as advertisement.⁴ Betting slips, coupons, and postal orders found on the premises may be used as part of the evidence that premises are a betting house, and justify the examination of witnesses with regard to these, although the complaint does not specify the transactions or names of the witnesses.⁵ Resorting is a question of fact.⁶

SUBSECTION (5).—*The Receipt of Money.*

1136. Where there is no physical resorting but there is evidence that the premises are kept as an office for the receipt of money in respect of a promise to pay in the event of a particular horse winning a particular race, the premises constitute a betting house.⁷ It is sufficient user of an office if the clerical work, the accounts, and the records of ready money betting transactions are done or kept there.⁸ The discovery by the police of betting slips, forms, and rules relating to horse-racing, along with a number of postal orders in a particular house, was held to justify the inference that the house was a betting house in terms of the Act.⁹ The money need not be intended to be received at the house itself¹⁰ if what was done was a necessary step towards the receipt of the money,¹¹ nor need the intended place of receipt be within the United Kingdom.¹² Letters delivered by post at an address in Glasgow and thereafter conveyed unopened to a house in Paisley to be dealt with there, were held to be received in the Paisley house, which was held to be a betting house.¹³

1137. Newspaper proprietors constitute their office a betting house when they issue football guessing coupons in their journals and offer

¹ 16 & 17 Vict. c. 119.

² *Brasiki v. Rees*, 1915, 79 J.P. 479; cf. *R. v. Kirkby, Parker & Patrick*, 1927, 20 Cr. App. R. 12.

³ *Traynor v. Macpherson*, 1911 S.C. (J.) 54; 6 Adam 407.

⁴ *R. v. Brown*, [1895] 1 Q.B. 119.

⁵ *Maguire v. Renton*, 1909 S.C. (J.) 21; 5 Adam 652.

⁶ *Taylor v. Monk*, [1914] 2 K.B. 817.

⁷ *Caminada v. Hulton*, 1891, 60 L.J. M.C. 116; *Leng & Co. v. Mackintosh*, 1914 S.C. (J.) 77; 3 Adam 144.

⁸ *R. v. Thompson*, 1924, 18 Cr. App. R. 31.

⁹ *Traynor v. Macpherson*, 1914 S.C. (J.) 174; 7 Adam 509; *R. v. Mortimer*, [1911] 1 K.B. 70.

¹⁰ *Boulton v. Hunt*, 1913, 23 Cox Cr. Cas. 526; 77 J.P. 337.

¹¹ *Lennox v. Stoddart*; *Davis v. Stoddart*, [1902] 2 K.B. 21.

¹² *Stoddart v. Hawke*, [1902] 1 K.B. 353; *Mackenzie v. Hawke*, [1902] 2 K.B. 216.

¹³ *M'Lauchlan v. Cameron*, 1916 S.C. (J.) 14; 7 Adam 716.

a prize for a correct forecast of matches, and at the same time invite the public to buy additional copies of the coupons, apart from the newspaper, for their use as competitors, so as to increase their chances of winning the prize, the payment of the sum charged for the additional coupons being held to be deposits on an event or contingency.¹ It was observed² that if nothing had been paid except the price of the copy of the newspaper it was likely that the Court would have followed English authority³ and found that no money had been paid by the purchaser of the newspaper as a deposit on the event or contingency. Where the proprietors of a journal contented themselves with publishing such a coupon therein and sold it to the public simply as a content of the journal through newsagents, it was held that they had not constituted their office a betting house,⁴ but Lord Hunter reserved his opinion on the question of publishers selling the newspaper containing the coupon from their own office, remarking that it was settled both in England and Scotland that it is not necessary that the money should be received at the publisher's office if that office is used for the purpose of money being received as the consideration for an undertaking to pay money thereafter on a contingency connected with racing or games.⁵ Football guessing competitions are further dealt with by the Ready Money Football Guessing Act, 1920.⁶

SECTION 4.—PERSONS LIABLE TO BE CHARGED.

SUBSECTION (1).—*Under the Betting Act, 1853.*

1138. These are the owner, occupier, or keeper of the premises, or any person having the care or management or in any manner conducting the business.⁷ It has been held that a charge of keeping, or assisting in keeping, premises as a gaming or betting house, without further specification, is relevant,⁸ but it was observed that complaints regarding contraventions of the Act of 1853 should state the names of the persons and the times at which they betted with the accused whenever possible.⁹ An alternative charge is competent, but not a general conviction following on it.¹⁰ In a prosecution under a similar

¹ *Hart v. Hay, Nisbet & Co.*, 1900, 2 F. (J.) 39; *Stoddart v. Sagar*, [1895] 2 Q.B. 474; *R. v. Stoddart*, [1901] 1 K.B. 177; *Hawke v. Hulton & Co.*, [1909] 2 K.B. 93; cf. *Suttle v. Cresswell*, 1925, 42 T.L.R. 75.

² By Lord McLaren in *Hart v. Hay, Nisbet & Co.*, *supra*, at p. 46.

³ *Caminada v. Hulton*, 1891, 60 L.J. M.C. 116; cf. *Suttle v. Cresswell*, [1926] 1 K.B. 264.

⁴ *Leng & Co., Ltd. v. Mackintosh*, 1914 S.C. (J.) 77; 7 Adam 356.

⁵ *Leng & Co., Ltd. v. Mackintosh*, *supra*, at p. 84.

⁶ 10 & 11 Geo. V. c. 50; see para. 1151, *infra*.

⁷ 16 & 17 Vict. c. 119, s. 1. For "assisting," see *Derby v. Bloomfield*, 1904, 68 J.P. 391.

⁸ *Duff v. Neilson*, 1892, 20 R. (J.) 33; 3 White 399; cf. *Hart v. M'Creadie*, 1899, 2 F. (J.) 1; 3 Adam 35.

⁹ *Bolton v. Murdoch*, 1890, 17 R. (J.) 22; 2 White 410; cf. *Walker v. Bonnar*, 1894, 22 R. (J.) 22; 2 Adam 85.

¹⁰ *Shaw v. Hart*, 1886, 1 White 270; *Lang v. Walker*, 1910 S.C. (J.) 41; 6 Adam 180; *M'Culloch v. Rae*, 1915 S.C. (J.) 43; 7 Adam 602.

section of a local Act¹ it was held that to secure a conviction against persons concerned in the management of such premises, proof that gaming took place within the premises is sufficient without also proving that the keeper of the premises derived profit therefrom.² It is not necessary to shew that the money was received before the race.³ One set of circumstances may constitute the two offences of (a) keeping a gaming house, and (b) conducting gaming in that house.⁴

SUBSECTION (2).—*Under the Burgh Police (Scotland) Act, 1892.*⁵

1139. The terms of this Act are similar to the terms of the Act of 1853.⁶ In addition, any person found in a house, room, or place which there are good grounds for believing to be a betting house may be taken into custody and charged unless he has a lawful excuse for being there.⁷

SECTION 5.—INVITATION TO BET.

1140. It is illegal to send, exhibit, or publish any letter, circular, or advertisement, etc., whereby it is made to appear that any house, office, room, or place is kept for making bets or for exhibiting betting lists, or to invite anyone to resort there for the purpose of betting,⁸ if it appears by reasonable inference from the advertisement that it refers to one of the two classes of betting rendered illegal by the Act, *i.e.* keeping a place (1) of resort, or (2) for the purpose of money being received.⁹

1141. It is illegal to send a letter, card, or advertisement inviting any person to make or take a share in or in connection with any bet or wager, or for the purpose of informing members of the public where they can get information regarding bets either within or outside the United Kingdom.¹⁰ But an advertisement by a newspaper publisher offering to give intelligence relating to horse-racing and not for the purpose of betting in any "place" is not an invitation to bet in contravention of the statutes.¹¹ It is, however, an offence to exhibit betting lists, to see which it is not necessary to resort to any particular betting house, giving information as to probable winners.¹²

1142. Where invitation to bet is made through the medium of the post, the offence is committed at both ends of the transmission, and the Court of the jurisdiction in which such an invitation was received

¹ The Glasgow Police (Further Powers) Act, 1892, s. 15.

² *Hislop v. M'Intyre*, 1917, J.C. 54; see *Foote v. Butler*, 1877, 41 J.P. 792; *R. v. Davies*, [1897] 2 Q.B. 199.

³ *Williamson v. Macpherson*, 1923, J.C. 3.

⁴ *Healy v. Wright*, 1923, J.C. 9.

⁵ 55 & 56 Vict. c. 55.

⁶ 16 & 17 Vict. c. 119.

⁷ 55 & 56 Vict. c. 55, s. 407.

⁸ 16 & 17 Vict. c. 119, s. 7.

⁹ *Ashley & Smith, Ltd. v. Hawke*, 1903, 19 T.L.R. 581.

¹⁰ Betting Act, 1874 (37 & 38 Vict. c. 15), s. 3, construed as one with the Betting Act, 1853.

¹¹ *Cox v. Andrews*, 1884, 12 Q.B.D. 126.

¹² *Hawke v. Mackenzie*, [1902] 2 K.B. 225.

is competent to try such an offence.¹ It is an offence to assist the making of bets by exhibiting advertisements of those who carry on a betting business and which contain an invitation to bet.² An invitation to bet accompanied by an address for correspondence is sufficient, and it is immaterial that no mention is made of the place where the bet will be accepted or that there is no resorting.³

1143. Every person who exhibits or publishes handbills or advertisements inviting persons to bet contravenes the Betting Act, 1874,⁴ whether he himself or someone else is held out as the person who is to receive the money as the consideration of the bet, and the Betting Act, 1853,⁴ is only referred to for the definition of a bet or wager.⁵

SECTION 6.—YOUNG PERSONS AND BETTING.

1144. By the Betting and Loans (Infants) Act, 1892,⁶ it is illegal for anyone, for the purpose of earning profit, to send to a person whom he knows to be a minor or pupil, any document inviting such person to enter into any betting transaction or to apply to any person or place for information in relation thereto. If the document is sent to a person at any place of education, knowledge of minority is presumed.⁷ But the address must shew that the sender knew that the addressee was an undergraduate or student.⁸ By the Street Betting Act, 1906,⁹ it is an offence for any person to have a betting transaction in a street or public place with a person under the apparent age of sixteen years, except on a racecourse for horse-racing on the days on which races take place.¹⁰ By the Racecourse Betting Act, 1928,¹¹ betting on any approved racecourse for horse-racing with a person under the apparent age of seventeen years is punished by a penalty not exceeding £50. By the Betting (Juvenile Messengers) (Scotland) Act, 1928,¹² it is made an offence to use a person under the age of sixteen (not being an officer of the Post Office acting in the course of his duty) in the delivery of messages relating to betting.

SECTION 7.—SEARCH WARRANTS.

1145. Any Justice of the Peace may give authority by special warrant to enter any premises suspected of being used as a betting house and to seize all documents relating to betting found therein.¹³ The police acting under a search warrant under authority may seize any such documents, including postal orders in premises, as are *prima facie*

¹ *Lipsey v. Mackintosh*, 1913 S.C. (J.) 104; 7 Adam 182.

² *Agnew v. Morley*, 1909 S.C. (J.) 41; 6 Adam 9.

³ *Stott v. Renton*, 1907 S.C. (J.) 88; 5 Adam 355.

⁴ *Cit. supra.*

⁵ *Agnew v. Morley, supra*; see also *Ashley & Smith, Ltd. v. Hawke*, 1903, 19 T.L.R.

581.

⁶ 55 & 56 Vict. c. 4.

⁷ *Ibid.*, ss. 1, 3, and 7.

⁸ *Milton v. Studd*, [1910] 2 K.B. 118.

⁹ 6 Edw. VII. c. 44, s. 1 (c).

¹⁰ *Ibid.*, s. 2.

¹¹ 18 & 19 Geo. V. c. 41, s. 4.

¹² 18 & 19 Geo. V. c. 27.

¹³ 16 & 17 Vict. c. 119, s. 11.

evidence of the fact in issue, although their decisive value can only be determined in the course of the trial. Such documents are admissible as evidence.¹ The police may also open postal or other communications found on the premises to discover whether they contain documents relating to betting.² No warrant is necessary to enter premises suspected of being a betting house under the Burgh Police (Scotland) Act, 1892.³ The limits of lawful seizure are to be found in the search warrant.⁴ Where a prosecution fails, the accused is entitled to recover seized funds.⁵

SECTION 8.—BOOKMAKING AND BETTING IN STREETS AND PUBLIC PLACES.

1146. Frequenting or loitering in streets or public places for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets, is an offence under the Street Betting Act, 1906.⁶ The word "street" includes any highway, public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.⁷ In Scotland the word "passage" includes a common close or common stair or passage leading thereto.⁸ A public place is defined as including any public park, garden, or sea beach, and any unenclosed ground to which the public have for the time being unrestricted access, and every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owner or persons having the control of the place a notice prohibiting betting therein.⁹ Betting in streets is also an offence under the Burgh Police (Scotland) Act, 1903.¹⁰

1147. A libel of loitering in a close is not a relevant charge under the statute.¹¹ Repeated visits are not necessary to constitute frequenting if the accused is there for hours at a time¹² or long enough to effect his purpose.¹³ The locality is of the essence of the offence, and a common close is the only species of close that is a "street" within the meaning of the Act.¹⁴ It is sufficient to constitute a passage a public passage within the meaning of the Act that it affords access to houses to persons who have legitimate public or private duties to perform in the neighbourhood.¹⁵ Loitering for the purpose of all or any of the alternative

¹ *Hodgson v. Macpherson*, 1913 S.C. (J.) 69; 7 Adam 118.

² *Strathearn v. Benson*, 1925, J.C. 40, partially overruling *M'Lauchlan v. Renton*, 1911 S.C. (J.) 12; 6 Adam 378.

³ *Bunton v. Miller*, 1926, S.L.T. 683; *King v. Kenny*, 1906, 4 Adam 275.

⁴ *Campbells v. Borthwick* (O.H.), 1903, 11 S.L.T. 74.

⁵ *Gordon v. Metropolitan Police Commr.*, [1910] 2 K.B. 1080.

⁶ 6 Edw. VII. c. 43, s. 1 (1).

⁷ *Ibid.*, s. 1 (4).

⁸ *Ibid.*, s. 3.

⁹ *Ibid.*, s. 2. See para. 1131, *supra*.

¹⁰ 3 Edw. VII. c. 33, s. 51; the section being enacted to counteract the decision in *Bonnar v. Walker*, 1896, 23 R. (J.) 39; 2 Adam 85.

¹¹ *Winning v. Jeans*, 1909 S.C. (J.) 26; 6 Adam 1.

¹² *Lang v. Walker*, 1902, 5 F. (J.) 8; 4 Adam 82.

¹³ *Airton v. Scott*, 1909, 25 T.L.R. 250.

¹⁴ *Winning v. Jeans*, *supra*.

¹⁵ *Mackie v. Crombie*, 1926 S.C. 29.

acts specified is not an alternative charge, and a general conviction is competent although the Court is unable to specify the particular purpose the accused had in mind.¹ A charge of loitering in a passage or unenclosed piece of ground, the same being a street or public place, is an alternative charge, and a general conviction is incompetent because "street" is defined in one way and "public place" in another.²

1148. To be an "enclosed place" the area need not be enclosed by unclimbable fences; it is enough if its limits are physically distinguished from adjacent ground in such a way as to let the public apprehend it is not public.³ An open area situated on a quay, to which the public had unrestricted right of access, was held to be unenclosed ground and therefore a public place.⁴ So was a place, once enclosed by wire fences, which had been allowed to fall into a state of absolute disrepair.⁵ A passage between two ground flats, completely closed at the back and having, at the entrance from the street, a door which was open all day but generally closed at night, falls within the definition of a common close, and it is not necessary to libel it as a common close.⁶ It was, however, held that a passage to which the public had no right of access, but to which the public could obtain access owing to the lock of a door being broken, is not a passage leading to a common close or common stair within the meaning of the Act, even although it led directly to a court which gave access to at least one common stair.⁷ The Act is intended to apply to a passage leading direct to a common stair.⁷ Under the Burgh Police (Scotland) Act, 1903,⁸ which is to be read and construed as one with the Burgh Police (Scotland) Act, 1892,⁹ "street" includes generally all public places within a burgh. Under it the following places have been held to be streets, viz.: ground giving access to docks and being part of a harbour, which is a public place;¹⁰ ground separated from a street by a fence over which a bookmaker leaned to take bets from persons in the street.¹¹ The mineral depot of a railway company to which the public have a conditional or restricted access and which has a notice prohibiting betting was held to be a public place.¹² A place is public although money is charged for admission thereto.¹³

1149. It is an offence under the Act to loiter in a street in order to distribute handbills stating that a third party therein named is willing to make bets¹⁴ or to receive betting slips although no definite sum is offered by the receiver and although he runs no risk of loss.¹⁵

¹ *Stenhouse v. Dykes*, 1908 S.C. (J.) 31; 5 Adam 553.

² *Lang v. Walker*, 1910 S.C. 41; 6 Adam 180. ³ *Ross v. Cameron*, 1921, J.C. 41.

⁴ *Campbell v. Kerr*, 1912 S.C. (J.) 10; 6 Adam 550.

⁵ *Breslin & M'Phee v. Thomson*, 1910 S.C. (J.) 5; 6 Adam 134.

⁶ *Vallance v. Campbell*, 1909 S.C. (J.) 9; 5 Adam 635.

⁷ *Hasson v. Neilson*, 1908 S.C. (J.) 57; 5 Adam 520. ⁸ 3 Edw. VII. c. 33, s. 51.

⁹ 55 & 56 Vict. c. 55. ¹⁰ *Smith v. Dykes*, 1907 S.C. (J.) 17; 5 Adam 206.

¹¹ *Queen v. Wilson*, 1910 S.C. (J.) 62; 6 Adam 238.

¹² *Walker v. Reid*, 1911 S.C. (J.) 41; 6 Adam 358.

¹³ *Airton v. Scott*, 1909, 25 T.L.R. 250. ¹⁴ *Dunning v. Swetman*, [1909] 1 K.B. 774.

¹⁵ *Yeudall v. M'Quilkie*, 1928, S.L.T. 443.

A County Council may make by-laws prohibiting persons from frequenting public places for the purpose of bookmaking or betting.¹

1150. A previous conviction libelled, used as an aggravation for the purpose of raising a second offence under the Street Betting Act, 1906, into the category of a third offence, must have been obtained under that Act.² The previous conviction may only be proved after the accused is convicted of the offence charged, and it is incompetent to prove it *in causa*.³

SECTION 9.—READY MONEY FOOTBALL BETTING.

1151. Ready money football betting businesses or agencies are dealt with by the Ready Money Football Betting Act, 1920.⁴ Such a business or agency is defined as any business or agency for the making of ready money bets, or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game.⁵ The following are offences under the Act: (a) writing, printing, publishing, or knowingly circulating any advertisement, circular, coupon of any such business, whether in the United Kingdom or not; or (b) knowingly causing, procuring, or attempting to cause or procure any of these things to be done; or (c) assisting therein.⁶ A football match forecasting competition by coupon, costing twopence, is ready money football betting although no definite prize is offered.⁷ A journal, containing coupons relating to football competitions, was sold by wholesale and retail agents to the public, the retail newsagents having weekly accounts with the wholesale firms, and the latter monthly accounts with the publishers of the journal. In these circumstances the publishers were held to have conducted football betting, the newsagents being held to have been their agents in the distribution of the circular of a ready money football betting business.⁸ It was held that when the vast majority of those purchasing a journal did so for the sake of football guessing coupons therein, the proprietors of the journal were conducting a ready money football guessing business.⁹ The printing of football betting coupons is an offence even although purporting to be for credit betting if they may equally well be used for ready money betting, and the element of knowledge of their possible wrongful use is immaterial.¹⁰ Football guessing competitions as infringements of the Betting Act, 1853, are dealt with above.¹¹

¹ Local Government (Scotland) Act, 1897 (52 & 53 Vict. c. 50), ss. 57-67; *Slowey v. Threshie*, 1901, 3 F. (J.) 73; 3 Adam 379; *Davies v. Jeans*, 1904, 6 F. (J.) 37; 4 Adam 336.

² *Hefferan v. Wright*, 1911 S.C. (J.) 20; 6 Adam 321; *R. v. Stone*, 1908, 72 J.P. 388.

³ *Campbell v. Kerr*, 1912 S.C. (J.) 10; 6 Adam 550.

⁴ 10 & 11 Geo. V. c. 52.

⁵ *Ibid.*, s. 2.

⁶ *Ibid.*, s. 1.

⁷ *Strang v. Brown*, 1923, J.C. 74; cf. *Yeudall v. McQuilkie*, 1928, S.L.T. 443.

⁸ *Jameson v. Sinclair*, 1925, J.C. 1.

⁹ *Sutcliffe v. Cresswell*, [1926] 1 K.B. 264.

¹⁰ *White v. Robertson*, 1925, 41 T.L.R. 484.

¹¹ See para. 1137, *supra*.

SECTION 10.—GAMING MACHINES.

1152. By the Gaming Machines (Scotland) Act, 1917,¹ the use of machines or mechanical contrivances for the purpose of any game, sport, hazard, or competition played or participated in by persons resorting thereto for a prize or stake in money or kind awarded or forfeited contingently on the result of the operation of such, is prohibited in shops, offices, rooms, or place, whether enclosed or not.² It does not matter whether the operation of the machine or contrivance is automatic or not. Under this Act it signifies nothing whether there is very little hazard and a great deal of skill, or a great deal of hazard and very little skill in the operation. If prizes are awarded and stakes of money forfeited contingently on the working of such a machine, even where it is partly automatic and partly not, an offence is committed.³ Where, however, persons resorting to a shop were permitted to amuse themselves by operating a machine by putting a coin in the slot, and were neither offered a prize nor forfeited a stake, it was held that the Act did not apply.⁴ The fact that a successful operation entitled the player to further manipulations free was held not to be a prize but a prolongation of the amusement for the same coin.⁴ A *pari mutuel* machine, although legally operative on a race-course for horse-racing, has been held to be a gaming machine and illegal when used in connection with gaming.⁵

SECTION 11.—SWINDLING UNDER THE GUISE OF GAMING.

1153. This is penalised by imprisonment by the Prevention of Gaming (Scotland) Act, 1869,⁶ and the Burgh Police (Scotland) Act, 1892.⁷ The Prevention of Gaming Act provides that all chain droppers, thimblers, loaded dice players, card sharpeners, and other persons of similar description who shall be found in any public place or in any grounds open to the public or in any public conveyance, in possession of implements or articles for the practice of these arts or other unlawful games, or who shall in any of these places exhibit such articles or implements in order to induce or entice any person to engage in any such game, or who by any such fraudulent act or device shall cozen or cheat or attempt to cozen or cheat any person in any of such places, may be convicted of an offence under the Act.

The Burgh Police (Scotland) Act, 1892,⁷ has a similar provision.

1154. It was held that the platform of a railway station is a public place.⁸ In the case of a prosecution under a similar section in the Aberdeen Police and Waterworks Act, 1862, but which contained the

¹ 7 & 8 Geo. V. c. 23.

² *Ibid.*, s. 1.

³ *Panetta v. M'Intyre*, 1918, J.C. 10; *Ulivi v. Miller*, 1927, J.C. 87.

⁴ *M'Intyre v. Tumelty*, 1918, J.C. 68.

⁵ *Tollett v. Thomas*, 1871, L.R. 6 Q.B. 514.

⁶ 32 & 33 Vict. c. 87, s. 3.

⁷ 55 & 56 Vict. c. 55, s. 406.

⁸ *Woods v. Lindsay*, 1910 S.C. (J.) 88; 6 Adam 294.

expression "and other swindler of that or any similar description," it was held that the accused, who exhibited a wheel of fortune for which he sold eight tickets at one penny each, and announced that he would keep threepence and pay fivepence to the winner, was not a swindler in the sense of the Act.¹ "Game" and "gaming" as used in the statute refer to games played for money.²

SECTION 12.—THE LOTTERY LAWS.

SUBSECTION (1).—*General.*

1155. State lotteries were at one time a regular institution in the United Kingdom, but the last of these was authorised by a statute of 1823,³ and they have now been finally abolished. The holding or setting up of a private lottery has probably always been illegal at common law in Scotland,⁴ and it has been penalised by statute. The statutes nominally in force are collected in the Appendix to the Report of the Joint Select Committee on Lotteries, etc., of 29th July 1908, No. 275. According to the Report, however, only the Gaming Act, 1802,⁵ and the Lotteries Act, 1823,³ are of practical utility. In practice, prosecutions are founded only on statute, although the common law can prevent the keeping of gaming houses. The Burgh Police (Scotland) Act, 1903,⁶ prohibits the conducting of lotteries of any kind in any street.

1156. The object of the Lottery Acts is to prevent the setting up of any lottery (other than Art Union Drawings⁷) in the United Kingdom, and the promotion by advertisement, sale of tickets or chances or otherwise, of any foreign lottery in the United Kingdom. Hence the Commissioners of Customs are entitled to prohibit the entry of, or confiscate advertisements relating to, foreign lotteries.⁸ It is not contrary to the Acts for a company to acquire the concession of the exclusive privilege of conducting lotteries in a foreign country, or to advertise in this country general statements of a number of drawings in that country to be made annually, no advertisement being made of any specific lottery.⁹

SUBSECTION (2).—*The Gaming Act, 1802.*⁵

1157. This Act declares all lotteries in houses and other places to be common and public nuisances and against law. The keeper of such a place, not authorised by Parliament, is liable in a fine of £500, and to be deemed a rogue and a vagabond.¹⁰ The police may, by special warrant, raid such a place and arrest all persons found therein as well as the keepers, if the former have knowingly aided in the offence.

¹ *Melvin v. Lamb*, 1890, 18 R. (J.) 10; 2 White 555.

² *Stuart v. Macpherson*, 1918, J.C. 96; cf. *R. v. Skelton*, 1895, 59 J.P. 664.

³ 4 Geo. IV. c. 60.

⁴ Bell, Dict.

⁵ 42 Geo. III. c. 119.

⁶ 3 Edw. VII. c. 33, s. 51.

⁷ See para. 1163, *infra*.

⁸ 61 & 62 Vict. c. 46.

⁹ *Macnee v. Persian Investment Corpn.*, 1890, 44 Ch. D. 306.

¹⁰ *Ibid.* s. 2.

They also are to be deemed rogues and vagabonds.¹ The public are forbidden to deal with the keepers of such places either by way of payment or delivery of goods, or to do anything with or without consideration on any contingency relative to the drawing of any ticket, lot, number, or figure in any game or lottery, or to publish any proposal for these purposes.²

SUBSECTION (3).—*The Lotteries Act, 1823.*³

1158. This Act forbids any person to sell any tickets for, or chances in, lotteries authorised by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery not authorised by Parliament, or to publish any proposal or scheme for such sale; and provides that for every such offence the person shall forfeit the sum of £50, and shall be deemed a rogue and a vagabond, and punished as such in manner thereafter directed.⁴ All pecuniary penalties for any offence under the Act are to be sued for in the name of His Majesty's Advocate-General in the Court of Exchequer in Scotland.⁵ Any person brought before any two or more Justices of the Peace, convicted of any offence against the Act and adjudged a rogue and vagabond, shall be imprisoned for not less than one and not more than six months.⁶ In charging an infringement of this Act it is not sufficient to specify the sale of tickets at a certain place on a certain date. The lottery must be identified, and a mere enumeration of some of the prizes will not do this. It is desirable that the place where the lottery is drawn be mentioned, and the prosecutor must specify the persons to whom the tickets were sold, if they are in fact known to him.⁷ It is sufficient publication of a proposal for a lottery that the proposal has been made known only to the printer of circulars intended to be sent to the public,⁸ or that the printer has made known his scheme to another who was to conduct the lottery himself by means of the printer's tickets.⁹ A question was raised¹⁰ whether action could be taken under s. 67 without, as a necessary preliminary, a decree of the Court of Exchequer in terms of ss. 41 and 62; but this doubt has been set at rest by a subsequent case in which proceedings by way of summary complaint in the Justice of Peace Court, without antecedent proceedings in the Court of Exchequer, were held competent.¹¹ The Court will not entertain an action to enforce delivery of a subject won in a lottery.¹²

¹ 42 Geo. III. c. 119, s. 4.

² *Ibid.*, s. 5.

³ 4 Geo. IV. c. 60.

⁴ *Ibid.*, s. 41.

⁵ *Ibid.*, s. 62.

⁶ *Ibid.*, c. 60, s. 67.

⁷ *M'Allister v. Douglas*, 1878, 5 R. (J.) 30; 4 Coup. 28; cf. *Walker v. Bonnar*, 1894, 22 R. (J.) 22; 1 Adam 523.

⁸ *Dew v. Director of Public Prosecutions*, 1921, 26 Cox Cr. Cas. 664.

⁹ *Ranson v. Burgess*, 1927, 43 T.L.R. 561; cf. *Bottomley v. Director of Public Prosecutions*, 1914, 31 T.L.R. 58.

¹⁰ *M'Allister v. Douglas*, *supra*.

¹¹ *Lamb v. Threshie*, 1892, 19 R. (J.) 78; 3 White 261; see also *Lord Advocate v. Dalrymple (O.H.)*, 1920, 1 S.L.T. 274.

¹² *Christison v. M'Bride*, 1881, 9 R. 34.

SUBSECTION (4).—*What is a Lottery?*

1159. There is no definition of a lottery in the 1823 Act, but it has been defined in England as “a distribution of prize by lot or chance.”¹ The Gaming Machines (Scotland) Act, 1917,² which prohibits mechanical play for money in any shop, office, room, or place, whether the manipulation of the machine depends on skill or chance,³ accordingly widens the above-quoted definition if the operation of the machine is to be considered as a lottery. Where, however, a gaming machine is not employed, or a prosecution is not under that Act, it is worthy of notice that it has been held that to engage in a game of skill, where success might be obtained on every occasion by the exercise of skill, although in the hands of an ordinary member of the public success largely depends on chance, is not to engage in a lottery.⁴ It was observed by Lord Skerrington that a statute directed against betting houses is not to be regarded as intended to strike at places where any and every kind of game is played for money.⁵ Where a coupon was issued with each copy of a paper but was filled up, not with a guess at random, but with the names of horses which the subscriber thought likely to win a race, and a prize was given to the person who filled in the names of the first four winners, it was held that the element of chance was absent from the selection and there was therefore no lottery.⁶

1160. The element of chance was present in the following cases and they were held to be lotteries: (1) A man sold packets of tea, each of which contained a coupon which entitled the purchaser to a prize, the prizes varying in description and value. The purchaser could not know to what prize he was entitled until the packet was purchased and opened.¹ (2) In a missing word competition a paragraph was published in which one word was missed out. A word, not the most suitable, was decided upon by the editor to fill the blank. A coupon was supplied in each copy of the paper, on which the competitor wrote a word to supply the blank, and also his name and address, and sent this, with one shilling, to the publishers of the paper. Those who correctly guessed the word chosen by the editor to fill the blank in the paragraph, each got as a prize an equal share in the total amount paid by the competitors.⁷ (3) When the profits of an undertaking are to

¹ *Taylor v. Smetten*, 1883, 11 Q.B.D. 207.

² 7 & 8 Geo. V. c. 23. See para. 1152, *supra*.

³ *Panetta v. M'Intyre*, 1918, J.C. 10; *Ulivi v. Miller*, 1927, J.C. 87.

⁴ *Di Carlo v. M'Intyre*, 1914 S.C. (J.) 60; 7 Adam 293; cf. *Morris v. Godfrey*, 1912 (C.C.A.), 28 T.L.R. 401; *R. v. Hendrick*, 1921, 37 T.L.R. 447; *Ogilvie v. Benigno*, 1905, 7 F. (J.) 82; 4 Adam 575; *Pessers v. Catt*, 1913, 29 T.L.R. 381; *Hill v. Pitt*, 1915, 79 J.P. 148.

⁵ In *Granata v. Mackintosh*, 1916 S.C. (J.) 48; *Peers v. Caldwell*, [1914] 1 K.B. 371, disapproved; cf. *Santongeli v. Neilson*, 1900, 3 F. (J.) 10; 3 Adam 234; *R. v. Kirkby, Parker & Patrick*, 1927, 20 Cr. App. R. 12; *Roberts v. Harrison*, 1909, 73 J.P. 439.

⁶ *Stoddart v. Sagar*, [1895] 2 Q.B. 474; *Caminada v. Hulton*, 1891, 60 L.J. M.C. 116; *Hall v. Cox*, [1899] 1 K.B. 198.

⁷ *Barclay v. Pearson*, [1893] 2 Ch. 154.

be divided among the partners by lot.¹ But the fact that certain benefits of a mutual benefit society are to be allotted among the members by periodical drawings will not suffice to impress the society with illegality.² (4) Prizes awarded at the will of an entertainer.³ (5) A prize awarded by a newspaper to holders of winning numbers selected arbitrarily, even although some members of the public may have paid nothing to enter the competition;⁴ it makes no difference that the winners are required to do some service to the promoters of the lottery.⁵ (6) A sweepstake;⁶ but it is not an offence under the Gaming Act, 1853.⁷ (7) A competition to "spot the right spot" out of a number of differently shaped spots published in various issues of a newspaper for prizes,⁸ even when the prize was not provided by the sale of tickets.⁹ (8) A Limerick competition.¹⁰

1161. The use of a room on one occasion for the draw of tickets in a lottery is not an offence under the Gaming Act, 1802.¹¹ A joint-stock company cannot be convicted of an offence under the Lotteries Act, 1823.¹²

SUBSECTION (5).—*Raffling.*

1162. A raffle is a lottery, and it does not appear that raffles for charitable or ecclesiastical purposes are more favoured in the sight of the law than those for personal gain, or that the defence that the statutes are really revenue statutes and not intended to meet the case of "harmless lotteries" would be received.¹³

SUBSECTION (6).—*Art Union Drawings.*

1163. The Art Unions Act, 1846,¹⁴ legalised associations having for their object the distribution by lot of works of art or of money prizes to be expended on the purchase of works of art. In order that such associations may conduct lotteries, they must either be incorporated by Act of Parliament or be approved by the Art Unions Committee of the Privy Council. Lotteries conducted by such an association with the object mentioned are the only lawful lotteries. To advertise any other lottery as conducted on Art Union principles is a meaningless

¹ *Sykes v. Beadon*, 1879, 11 Ch. D. 170.

² *Wallingford v. The Mutual Society*, 1880, 5 App. Cas. 685.

³ *Minty v. Sylvester*, 1915, 31 T.L.R. 589.

⁴ *Willis v. Young & Stenbridge*, [1907] 1 K.B. 448.

⁵ *Kerslake v. Knight*, 1925, 41 T.L.R. 555.

⁶ *Hardwicke v. Lane*, [1904] 1 K.B. 204.

⁷ *R. v. Hobbs*, [1898] 2 Q.B. 647; see *Clubs*, para. 1133, *supra*.

⁸ *Hall v. M'William*, 1901, 17 T.L.R. 561.

⁹ *Bartlett v. Parker*, [1912] 2 K.B. 497.

¹⁰ *Blyth v. Hulton & Co.*, 1908, 24 T.L.R. 719; *Smith's Advertising Agency v. Leeds Laboratory Co.*, 1910, 26 T.L.R. 335.

¹¹ *Martin v. Benjamin*, [1907] 1 K.B. 64.

¹² *Hawke v. Hulton & Co.*, [1909] 2 K.B. 93.

¹³ *Lamb v. Theshie*, 1892, 19 R. (J.) 78; 3 White 261.

¹⁴ 9 & 10 Vict. c. 48.

cloak for an illegal operation, and can confer no immunity or right on those who take part in it.¹

SECTION 13.—BOOKMAKERS.

SUBSECTION (1).—*Definition and Obligations.*

1164. A bookmaker is any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets.² A bet means a bet on an event of any kind.³ To carry on business a bookmaker must take out annually a "bookmaker's certificate,"⁴ as also an "entry certificate" in respect of the entry for any betting premises kept or used by him.⁴ These certificates do not render lawful any betting in any manner or place which is unlawful at common law or by statute.⁵ It is no excuse for failing to take out a certificate that the bookmaking is illegal.⁶ Betting duty is payable by the bookmaker with whom a bet is made, and any officer authorised by the Commissioners of Customs and Excise for the purpose may enter any place where for the time being betting with bookmakers is being carried on, and also any betting premises, with a view to seeing whether the provisions of the Finance Act, 1926, and of any regulations made thereunder as to betting duty, are being complied with.⁷ These enactments are sanctioned by adequate penalties, and a conviction under the Finance Act, 1926, is valid although the same *species facti* have already formed the ground of a conviction under the Betting Act, 1853.⁸

SUBSECTION (2).—*Rights of Bookmakers.*

1165. The Gaming Acts of 1845⁹ and 1892¹⁰ do not apply to Scotland.¹¹ Accordingly the laws of the two countries differ in regard to the rights of betting agents. In Scotland such an agent can sue his principal for money disbursed in unsuccessful wagering on his instructions.¹² Such contracts of agency are void in England under the Act of 1892.¹³ It was, however, held that a commission agent who had omitted to

¹ *Christison v. M'Bride*, 1881, 9 R. 34; *R. v. Harris*, 1866, 10 Cox Cr. Cas. 352.

² Finance Act, 1926 (16 & 17 Geo. V. c. 22), s. 18 (1); Betting (Juvenile Messengers) (Scotland) Act, 1928 (18 & 19 Geo. V. c. 27).

³ Finance Act, 1926 (16 & 17 Geo. V. c. 22), s. 18 (1).

⁴ *Ibid.*, s. 15 (1).

⁵ *Ibid.*, s. 15 (2).

⁶ *M'Coll v. Hyndman*, 1928, S.L.T. 126.

⁷ 16 & 17 Geo. V. c. 22, s. 16 (2).

⁸ *Clark v. Westaway*, [1927] 2 K.B. 597.

⁹ 8 & 9 Vict. c. 109.

¹⁰ 55 & 56 Vict. c. 9.

¹¹ *Levy v. Jackson*, 1903, 5 F. 1170.

¹² *Knight & Co. v. Stott*, 1892, 19 R. 959; cf. *Maskell v. Hill*, [1921] 3 K.B. 157.

¹³ *Saffery v. Mayer*, [1901] 1 K.B. 11; *Tatam v. Reeve*, [1893] 1 Q.B. 44; *Carney v. Plimmer*, [1897] 1 Q.B. 634; *Gasson v. Cole*, 1910, 26 T.L.R. 468.

make bets as instructed by his principal was not liable for breach of contract, on the ground that if money had been won it would have been irrecoverable;¹ but he is liable to return money deposited with him.² Although designating himself a turf agent he is no agent but simply a bookmaker, and the Court will not entertain an action against him for payment of a debt even although the Gaming Acts are not pleaded, it being *pars judicis* to give effect to the rules rising out of *sponsio ludicra*.³ It is criminal to send fraudulent telegrams in order to swindle bookmakers⁴ or to cheat them.⁵

SUBSECTION (3).—*Jurisdiction.*

1166. Where a bookmaker posts invitations to bet in one town, and delivery of the invitations is made in a town in the jurisdiction of a different Sheriff, he may be prosecuted in either jurisdiction.⁶

¹ *Cohen v. Kittell*, 1889, 22 Q.B.D. 680; cf. *Hamilton v. M'Lauchlan* (O.H.), 1908, 16 S.L.T. 341.

² *Vogt v. Mortimer*, [1906] W.N. 180.

³ *Hamilton v. M'Lauchlan*, *supra*.

⁴ *Claytons v. H.M. Advocate*, 1906, 8 F. (J.) 41; 5 Adam 12.

⁵ *R. v. Buckmaster*, 1888, 20 Q.B.D. 182.

⁶ *Lipsey v. Mackintosh*, 1913 S.C. (J.) 104; 7 Adam 182.

GAS.

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SECTION 1.—INTRODUCTORY.

1167. No statutory authority is necessary for the manufacture and distribution of gas by a private individual or company, though a local authority requires special statutory powers or must conform with certain statutory procedure. Nor are undertakers operating under statutory powers in a particular area necessarily secure against competition from a non-statutory company.¹ Companies, however, frequently find it advantageous to operate under statutory authority, as they thereby obtain powers which they would not otherwise possess.

SECTION 2.—POWERS AND DUTIES OF STATUTORY UNDERTAKERS.

SUBSECTION (1).—*The Gasworks Clauses Acts.*

1168. The Gasworks Clauses Act, 1847,² applies when incorporated by a special Act authorising the construction of gasworks.³ The Gasworks Clauses Act, 1871,⁴ applies to every gas undertaking authorised by a special Act thereafter passed or by a provisional order made under the Gas and Water Works Facilities Act, 1870.⁵ It would appear, however, that the Act of 1871 applies also to an undertaking authorised

¹ See *Dundee Gas Light Co. v. Mags. of Dundee*, 1847, 9 D. 1084.

² 10 & 11 Vict. c. 15.

³ 1847, ss. 1–5.

⁴ 34 & 35 Vict. c. 41.

⁵ 1871, s. 3.

prior to 1871, where the special Act has incorporated the Act of 1847.¹ The provisions of the Gasworks Clauses Acts may be varied or excepted by the special Act.² The two Acts fall to be construed together as one Act.³ These Acts confer certain powers and prescribe certain conditions with which, along with the provisions of the special Act, statutory undertakers must comply. Undertakers must make copies of their special Act available to the public.⁴

SUBSECTION (2).—*Laying of Pipes, etc.*

1169. Subject to certain conditions as to notice and superintendence,⁵ undertakers may, within the limits of their special Act, break up the soil and pavement of streets and bridges, and open sewers, drains, and tunnels therein for the purpose of laying their pipes and carrying out other acts necessary for the supply of gas.⁶ They are liable under penalties to guard excavations made and to reinstate the ground without delay, and to maintain the same against subsidence for a period of twelve months.⁷ They must make compensation for any damage done in the exercise of their powers.⁸ They cannot, however, without consent, enter on private land not dedicated to public use, unless to replace or repair a pipe already lawfully laid down there.⁹ Where statutory undertakers wish to lay or repair pipes in a road or street outwith their area the consent of the road authority must be obtained.¹⁰

SUBSECTION (3).—*Application of Lands Clauses Acts.*

1170. Apart from their powers to break up streets, gas undertakers have no compulsory powers outside the provisions of their special Acts. Under the Act of 1871 they may acquire rights of wayleave and others from persons under disability, in the same manner as under the Lands Clauses Acts.¹¹ And they may sell superfluous lands under the provisions of these same Acts.¹²

SUBSECTION (4).—*Protection of Public against Nuisance.*

1171. Gasworks authorised since 1871 may not be set up on lands other than the lands described in the special Act;¹³ nor may gas be

¹ See *Commercial Gas Co. v. Scott*, 1875, L.R. 10 Q.B. 400; and cases discussed in Michael and Will on Gas, p. 180.

² 1847, s. 5; 1871, s. 3.

³ 1871, s. 1.

⁴ 1847, ss. 45, 46.

⁵ 1847, ss. 8, 9; *Redhill Gas Co. v. Reigate Rural District Council*, [1911] 2 K.B. 565.

⁶ 1847, s. 6; see s. 3 for definition of "street"; *Caledonian Rly. Co. v. Corporation of Glasgow*, 1901, 5 F. 526, and *Schweder v. Worthing Gas, etc. Co.*, [1912] 1 Ch. 83, for meaning of "tunnel."

⁷ 1847, ss. 10–12; *Brame v. Commercial Gas Co.*, [1914] 3 K.B. 1181.

⁸ 1847, s. 6.

⁹ *Ibid.*, s. 7; *Schweder v. Worthing Gas Co.* (No. 2), [1913] 1 Ch. 118.

¹⁰ *Kirkcaldy District Committee v. Buckhaven and Leven Gas Commrs.*, 1925 S.N. 54.

¹¹ 1871, s. 10; see COMPULSORY PURCHASE.

¹² 1871, s. 6; see COMPULSORY PURCHASE.

¹³ 1871, s. 5; see *Mags. of Gourock*, 1911, 2 S.L.T. 288.

stored, except upon such lands, without the consent of the owner, lessee, and occupier of every dwelling-house within 300 yards of the intended place of storage.¹ Penalties are imposed upon undertakers for fouling water² and for escape of gas,³ and powers are given to private persons whose water is fouled for the discovery of the source of such fouling.⁴ Undertakers are liable generally to legal proceedings for nuisance.⁵ Civil proceedings on the ground of nuisance may be taken independently of fault.⁶

SUBSECTION (5).—*Supply of Gas.*

1172. In the case of undertakings authorised by a special Act obtained prior to the passing of the Gasworks Clauses Act, 1871, the powers and duties of the undertakers in the matter of the supply of gas are regulated by their special Act and, where it incorporates the Gasworks Clauses Act, 1847, by ss. 13–17 of that Act.⁷ These sections are repealed as regards any undertaking authorised by a special Act passed since the Gasworks Clauses Act, 1871.⁷ In such case the undertakers are under obligation, when required and subject to certain conditions, to supply gas at prescribed pressure to the owner or occupier of any premises situated within twenty-five yards from any main of the undertakers, or other distance prescribed by the special Act.⁸ The undertakers must also supply gas to any public lamps of a road authority within fifty yards from a main, in such quantity as is required and at a price to be agreed or fixed by arbitration.⁹ Penalties are imposed on the undertakers for failure to implement their obligations of supply.¹⁰ But these obligations are not absolute.¹¹ The Board of Trade may relieve the undertakers from their obligation to supply gas where the competition of electric light has made such supply unprofitable.¹²

1173. In connection with the supply of gas, provision is made for the use and supply of meters,¹³ for the ascertainment and recovery of gas charges,¹⁴ and for cutting off the supply,¹⁵ and penalties are imposed for the fraudulent misuse and abstraction of gas,¹⁶ and for wilful or accidental damage done to the pipes or other property of the under-

¹ 1871, s. 5; see *Mags. of Gourock*, 1911, 2 S.L.T. 288.

² 1847, ss. 21–23, 25; *Hipkins v. Birmingham and Staffordshire Gas Co.*, 1860, 30 L.J. Ex. 60; see also Public Health (Scotland) Act, 1897, ss. 127–129, which is not confined to statutory undertakers.

³ 1847, s. 24.

⁴ *Ibid.*, ss. 26–28.

⁵ *Ibid.*, s. 29; 1871, s. 9.

⁶ *Giblin v. Middle Ward District Committee of Lanarkshire County Council*, 1927, S.L.T. 563; *Jordeson v. Sutton, etc. Gas Co.*, [1899] 2 Ch. 217; *Attorney-General v. Gas Light and Coke Co.*, 1877, 7 Ch. D. 217.

⁷ See 38 & 39 Vict. c. 66, s. 1, and Schedule.

⁸ 1871, s. 11.

⁹ *Ibid.*, s. 24.

¹⁰ *Ibid.*, s. 36.

¹¹ *Richmond Gas Co. v. Richmond (Surrey) Corporation*, [1893] 1 Q.B. 56.

¹² 45 & 46 Vict. c. 56, s. 29.

¹³ 1847, s. 14; 1871, ss. 13, 14, 15, 17, 18, 19, 25.

¹⁴ 1847, ss. 15, 16; 1871, ss. 16, 20, 21, 23, 40, 41–45.

¹⁵ 1847, ss. 16, 17; 1871, ss. 11, 22, 40.

¹⁶ 1847, s. 18; 1871, s. 38; see *Mags. of Falkirk v. Russell*, 1911 S.C. (J.) 99.

takers.¹ Damages may be recovered for injuries to pipes caused by the road-rolling operations of the road authority.²

SUBSECTION (6).—*Quality of Gas.*

1174. In the case of statutory undertakings authorised since the commencement of the Gasworks Clauses Act, 1871, the gas supplied must conform to a prescribed standard of illuminating power and purity.³ Facilities for testing and the necessary apparatus must be supplied by the undertakers,⁴ and provision is made for the appointment of an independent gas examiner by the local authority or two justices,⁵ and for the due exercise of his powers.⁶ On application of the undertakers to the appropriate Government department a standard of calorific power may now be substituted for the prescribed standard of illuminating power, and the necessary consequential changes be made in the matter of penalties and testing.⁷ Penalties for defective pressure, power, or purity are prescribed by the statute.⁸ These penalty clauses exclude any other remedy.⁹ The statutory provisions as to quality may be superseded by order made under the Gas Regulation Act, 1920.¹⁰

SUBSECTION (7).—*Accounts and Profits of Undertakers.*

1175. Undertakers are bound under penalties to furnish annual accounts to the Board of Trade, and to supply a copy thereof to the local authority, and to have copies available for sale to the public. These matters are now regulated by the Gas Regulation Act, 1920,¹¹ which supersedes corresponding provisions in the Gasworks Clauses Acts. The undertakers are subject to statutory restriction as to the amount of profits they can distribute in any year. They cannot exceed a dividend of ten per cent. on the paid-up capital in any year, except to make up arrears of former years.¹² Thereafter the profits go to form a reserve fund of prescribed amount.¹³ From this reserve deficiencies in dividend may be made up,¹³ or extraordinary demands may be met on certificate of the Sheriff.¹⁴ When the reserve fund has reached its prescribed limit the interest thereof is applied to the general purposes of the undertaking,¹⁵ and if profits in excess of ten per cent. are then made, the Sheriff may, on petition of two gas-rate payers, make reductions in the price of gas.¹⁶

¹ 1847, ss. 19, 20.

² *Gas Light and Coke Co. v. St. Mary's Vestry*, 1885, 15 Q.B.D. 1.

³ 1871, s. 12, and Schedule A.

⁵ *Ibid.*, ss. 29, 30; possibly also by the Sheriff, 1847, s. 42.

⁷ 6 & 7 Geo. V. c. 25.

⁸ *Clegg Parkinson & Co. v. Earby Gas Co.*, [1896] 1 Q.B. 592; *Atkinson v. Newcastle Waterworks Co.*, 1877, 2 Ex. D. 441.

¹⁰ Para. 1183, *infra*.

¹² 1847, s. 30.

¹⁴ *Ibid.*, ss. 31, 32.

¹⁶ *Ibid.*, ss. 35-37; see *The Queen v. Recorder of Hanley*, 1889, 19 Q.B.D. 481.

⁴ *Ibid.*, s. 28.

⁶ 1871, ss. 29-34.

⁹ 1871, ss. 36, 37.

¹¹ 10 & 11 Geo. V. c. 28, s. 15.

¹³ *Ibid.*, ss. 31, 34.

¹⁵ *Ibid.*, s. 33.

SUBSECTION (8).—*Other Financial Provisions.*

1176. Mortgagees of the undertakers whose debt amounts to £1000 or other prescribed sum may apply for the appointment of a judicial factor.¹ The guardian of a minor, idiot, or lunatic shareholder in the undertaking may grant discharges for any sums due by the undertakers to such shareholder.² The recovery of damages, not specially provided for, and other matters referred to the Sheriff or justices, are determined under the provisions of the Railway Clauses Acts.³

SECTION 3.—GAS MEASURES AND STANDARDS.

SUBSECTION (1).—*The Meter.*

1177. Prior to 1920 the legal standard or unit of measure for the sale of gas by meter was the cubic foot, as defined by the Sale of Gas Act, 1859.⁴ Provision was made by that Act for the testing of meters by standard models, for the stamping of same, and for the appointment of meter inspectors. But the Act did not come into operation in any county until adopted by the commissioners of supply,⁵ or in royal burghs, or parliamentary burghs with a population of 20,000, until adopted by the magistrates of such burghs.⁶ The duties with reference to the verification and provision of standard measures under the Act are now vested in the Board of Trade.⁷ All meters by means of which gas is supplied by statutory undertakers must, since 1920, be stamped in accordance with Board of Trade Regulations.⁸ The Sale of Gas Acts as regards testing of gas-measuring instruments are thereby superseded.⁹ An inspector of meters now requires a certificate of capacity from the Board of Trade.¹⁰

1178. In the case of statutory undertakers, gas sold by meter required to be of a standard of power, purity, and pressure prescribed by the special Act or by the Acts incorporated therewith.¹¹

SUBSECTION (2).—*The Therm.*

1179. Since the passing of the Gas Regulation Act, 1920,¹² statutory undertakers may, on application to the Board of Trade, obtain power to charge for thermal units supplied in the form of gas, in place of

¹ 1871, s. 8.² *Ibid.*, s. 7.³ 1847, s. 40.⁴ 22 & 23 Vict. c. 66, s. 2.⁵ 23 & 24 Vict. c. 146.⁶ 22 & 23 Vict. c. 66, s. 4; 27 & 28 Vict. c. 96. Where a royal burgh was a county town in which gas was used, the Act seemed to apply without adoption. See Act of 1859, s. 4.⁷ Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 33, 66; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 15; Weights and Measures Act, 1904 (4 Edw. VII. c. 28), ss. 5 and 6; Gas Regulation Act, 1920 (10 & 11 Geo. V. c. 28), s. 12.⁸ Gas Regulation Act, 1920, ss. 13, 18; see Gas Meter Regulations, 1920, S.R. & O. 1920, No. 2354; Gas Meters (Fees) Order, 1922, S.R. & O. 1922, No. 625.⁹ 1920, s. 19.¹⁰ *Ibid.*, s. 14.¹¹ See, e.g. paras. 1172 and 1174, *supra*.¹² 10 & 11 Geo. V. c. 28.

supplying gas of any particular illuminating power or calorific value.¹ After two years from the passing of the Act, the Board of Trade may itself pass an order imposing this method of supply upon statutory undertakers who have not applied for such power.² An order so issued authorises the undertakers to charge a standard or maximum price per "therm."³ A "therm" equals 100,000 British thermal units. The number of British thermal units (gross) produced by the combustion of a cubic foot of gas under certain prescribed conditions fixes the calorific value of the gas.⁴ The undertakers must declare the calorific value of the gas which they intend to supply, and may alter the same upon due notice.⁵ The number of therms sold or consumed is thus ascertained by multiplying the number of cubic feet shown on the meter by the declared calorific value of the gas. No person may charge for the supply of gas on a therm basis unless authorised under the Act of 1920, or by special Act.⁶

1180. When such an order has been made, the undertakers come under further statutory requirements as to purity and pressure.⁷ Provision is made for the appointment by the Board of Trade of three gas referees and a chief gas examiner, and for the appointment of a gas examiner by the local authority or the Sheriff.⁸ The referees are empowered to prescribe the methods of testing the gas supplied under such an order.⁹ A right of appeal to the chief gas examiner is given to undertakers aggrieved by such prescription.¹⁰ Inspections are carried out by the gas examiner,¹¹ against whose reports a right of appeal is also given to the chief gas examiner.¹² Penalties are imposed for failure to comply with the requirements of the gas referees or examiner,¹³ or for deficiencies in the declared calorific value, or in the statutory purity or pressure.¹⁴ If in any quarter there is a deficiency in the declared calorific value, the chief examiner may further fix a sum to be applied by the undertakers in reducing the price of gas.¹⁵ The Act contains other provisions in relief or mitigation of the statutory penalties where the deficiency was due to circumstances beyond the undertakers' control,¹⁶ or was unsubstantial or not due to carelessness.¹⁷

SECTION 4.—ACQUISITION OF STATUTORY POWERS.

SUBSECTION (1).—*Supply under Provisional Order.*

1181. The Gas and Water Works Facilities Acts¹⁸ afford to undertakers a means of obtaining statutory powers by way of provisional order. Under them application may be made for powers to construct

¹ 10 & 11 Geo. V. c. 28, ss. 1 (1), 18; procedure prescribed by S.R. & O. 1922, No. 380, and S.R. & O. 1923, No. 439. ² 10 & 11 Geo. V. c. 28, s. 1 (5).

³ *Ibid.*, s. 1 (2). ⁴ *Ibid.*, s. 1 (7).

⁵ *Ibid.*, s. 1 (4). ⁶ *Ibid.*, s. 3.

⁷ *Ibid.*, s. 2. ⁸ *Ibid.*, ss. 4, 21.

⁹ *Ibid.*, s. 5. ¹⁰ *Ibid.*, s. 6 (1).

¹¹ *Ibid.*, ss. 4 (3), 5 (1), (4).

¹² *Ibid.*, s. 6 (2). ¹³ *Ibid.*, s. 8.

¹⁴ *Ibid.*, s. 9. ¹⁵ *Ibid.*, s. 9 (4).

¹⁶ *Ibid.*, s. 9 (3). ¹⁷ *Ibid.*, s. 9 (6).

¹⁸ Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70); Gas and Water Works Facilities Act, 1873 (36 & 37 Vict. c. 89).

or to maintain and continue gasworks and supply gas, but only if there is not already a company or other authority possessing statutory powers of supply in the district.¹ Application may also be made for power to raise additional capital, or for authority to enter into joint agreements between, or to amalgamate, two undertakings.² Where power is desired to construct gasworks or to break up roads, the consent of the local authority or the road authority is necessary to the application, unless dispensed with by the Board of Trade.³ Applicants for powers must comply with procedure prescribed as to notice and deposit of documents.⁴ The Board of Trade determines if the application may proceed⁵ and may order inquiry.⁶ If the Board of Trade sanctions the order,⁷ it must be deposited and advertised in the manner prescribed by the Act.⁸ It requires Parliamentary confirmation.⁹

1182. Such an order cannot confer powers of compulsory purchase.¹⁰ The order fixes the prices to be charged for gas.¹¹ It also must include the provisions of the Lands Clauses Acts, except those relating to purchase otherwise than by agreement and entry upon lands, and the provisions of the Gasworks Clauses Act, 1847, unless the provisions of these Acts are expressly varied or excepted.¹² The Gasworks Clauses Act, 1871, applies without incorporation, save in so far as varied or excepted.¹³ The Board of Trade may revoke, amend, vary, or extend such an order upon application made, and subject to like procedure, as under the original order.¹⁴ The powers conferred will lapse, unless prolonged by the Board, if not put into execution within certain prescribed periods.¹⁵ The powers conferred are subject to the provisions of any general Act of Parliament relating to gasworks passed subsequent to the Act of 1870,¹⁶ and to revision by Parliament of the maximum rents and rates under the Order.¹⁸

SUBSECTION (2).—*Special Order under Gas Regulation Act, 1920.*¹⁷

1183. In place of applying for a provisional order under the Gas and Water Works Facilities Acts, any local authority, being a county council or a town council,¹⁸ or company or person, may apply to the Board of Trade for a special order under s. 10 of the Gas Regulation Act, 1920.¹⁹ Such a special order lies before Parliament, and must be approved by both Houses by resolution, with or without modification, before it becomes effective.²⁰ On becoming effective it is equivalent to a special Act.²¹

1184. Wider powers may be obtained by such special order than under the Gas and Waterworks Facilities Acts. These include power to

¹ 1870, s. 3 (1).

² *Ibid.*, s. 3 (3), (4), (5).

³ *Ibid.*, s. 4.

⁴ *Ibid.*, ss. 5, 6, and Schedule B.

⁵ *Ibid.*, ss. 6, 7.

⁶ 1873, s. 13.

⁷ 1870, s. 7.

⁸ *Ibid.*, s. 8, and Schedule B, Part IV.

⁹ *Ibid.*, s. 9.

¹⁰ *Ibid.*, ss. 7, 10.

¹¹ *Ibid.*, ss. 12, 13.

¹² *Ibid.*, s. 10.

¹³ 34 & 35 Vict. c. 41, s. 3.

¹⁴ 1873, s. 12.

¹⁵ 1870, s. 11.

¹⁶ *Ibid.*, s. 13.

¹⁷ 10 & 11 Geo. V. c. 28.

¹⁸ *Ibid.*, s. 21.

¹⁹ *Ibid.*, s. 10; procedure prescribed by S.R. & O. 1922, No. 187.

²⁰ *Ibid.*, s. 10 (4).

²¹ *Ibid.*, s. 10 (5).

obtain supply in bulk, power to give a separate industrial supply, power to a local authority, authorised to supply within its area, to supply outside its area, power to purchase by agreement, or to co-operate or amalgamate with, other undertakings, power to set up superannuation and pension funds, power to make various financial readjustments of the undertaking's finances, and power to amend the provisions of the special Act so as to provide for the proper and efficient conduct of the undertaking.¹ The procedure to be followed in the making of such special orders is that prescribed by ss. 80 and 81 of the Factory and Workshop Act, 1901, as adapted by the Schedule of the Gas Regulation Act, 1920.²

SECTION 5.—SUPPLY BY LOCAL AUTHORITIES.

SUBSECTION (1).—*The Burghs Gas Supply Act.*

1185. Apart from promoting a special Act or applying for a provisional or special order,³ the only Act under which a local authority can supply gas to the public is the Burghs Gas Supply (Scotland) Act, 1876.⁴ This Act, which is adoptive, applies only to town councils or, under and subject to the provisions of s. 44 (10) of the Local Government (Scotland) Act, 1894,⁵ to District Committees. The Act is to be read along with the Burghs Gas Supply (Scotland) Act, 1893,⁶ and the Burghs Gas Supply (Scotland) Act, 1918.⁷

SUBSECTION (2).—*Adoption of Act.*

1186. The Act must be adopted at a meeting of Council specially called, and after due advertisement and publication the resolution of adoption must be confirmed by a two-thirds majority of the Council as constituted after the next ensuing annual election.⁸ Thereafter, within a period of one month, during which further advertisement and publication must be made, twenty ratepayers may demand a poll. If no such poll is demanded, or if the adoption is approved at a poll, the Sheriff authorises the resolution to be registered in the Sheriff Court books, and the Act comes into force from the date of such registration.⁹ The poll of ratepayers falls to be taken under the provisions of the Burgh Police (Scotland) Act, 1893.¹⁰

SUBSECTION (3).—*Condition of Application.*

1187. The Act does not empower the burgh adopting it to supply gas within any part of the area of supply over which the town council or commissioners of police of any other burgh or any gas company,

¹ 10 & 11 Geo. V. c. 28, s. 10 (2).

² *Ibid.*, s. 10 (3), and Schedule.

³ See Gas and Water Works Facilities Acts, *supra*, para. 1181.

⁴ 39 & 40 Vict. c. 49.

⁵ 57 and 58 Vict. c. 58.

⁶ 56 & 57 Vict. c. 52.

⁷ 8 & 9 Geo. V. c. 45.

⁸ 1876, s. 4.

⁹ *Ibid.*, s. 5.

¹⁰ *Cowdenbeath Gas Co. v. Provost of Cowdenbeath*, 1915 S.C. 387.

incorporated by Act of Parliament, or any company, partnership, or person authorised by any provisional order confirmed by Act of Parliament have statutory powers to supply gas.¹

SUBSECTION (4).—*Administrative Provisions.*

1188. The authority for executing the Act when adopted is the town council of the burgh.² The town council may appoint a committee of their number for the execution of the Act, to be called the "Gas Committee."³ Two or more burghs who have adopted the provisions of this Act may amalgamate for the purposes of the Act, and the joint committees are called "The Joint Gas Committee."⁴ The Act contains provisions for regulating procedure at meetings and for the keeping and auditing of books and accounts.⁵

SUBSECTION (5).—*Erection and Purchase of Works.*

1189. The Act confers upon the town council no powers of compulsory purchase. The Lands Clauses Acts are incorporated without the clauses relating to the purchase of lands otherwise than by agreement.⁶ Nor may they compete with a statutory undertaking. Their power to compete with a non-statutory undertaking is limited by the provisions hereinafter mentioned. Subject to these limitations the town council may erect, lay down, improve, extend, and maintain gasworks, gasometers, and pipes for the distribution of gas, and execute all such works as may be necessary for the efficient manufacture and supply of gas for public and private purposes, and may purchase, acquire, and hold lands and other property for these purposes, and may carry on any such operations and business as are usually carried on by gas companies. They may not manufacture or store gas, or any residual products, upon any lands without the previous consent in writing of the owner, lessee, and occupier of every dwelling-house situate within three hundred yards of the limits of such lands.⁷ Otherwise before proceeding with such manufacture or storage the town council shall give notice in writing to every owner, lessee, and occupier of every dwelling-house situate within three hundred yards of the limits of the land in question and by advertisement published once a week for two weeks in any newspaper circulating within the burgh, of their intention to proceed with such manufacture and storage, and in the event of any owner, lessee, or occupier refusing or delaying to give the consent provided for in the Act for more than ten days after the last date of publication of such advertisement, the Sheriff may, on the application of the council, and after such investigation and inquiry as he may deem necessary, by a deliverance under his hand find and declare that such consent may be dispensed with, and such deliverance shall

¹ 1876, s. 2.

⁴ *Ibid.*, s. 9.

² *Ibid.*, s. 7; 63 & 64 Vict. c. 49, ss. 5, 7, 8.

⁵ *Ibid.*, ss. 10-17.

⁶ *Ibid.*, s. 4.

³ 1876, s. 8.

⁷ *Ibid.*, s. 18.

be final and not subject to review, and the Sheriff shall make such finding as to the expenses of the application as shall seem to him just in the circumstances.¹

1190. The town council may sell superfluous lands and dispose of works, buildings, and erections not required by them.² They may purchase any undertaking supplying gas within the burgh which is carried on by a company not incorporated by Act of Parliament, or authorised by provisional order confirmed by Act of Parliament.³ A special resolution of the shareholders is required in the case of a company registered under the Companies Acts. If not so registered, a three-fourths majority in value of the members must consent to the transaction at a meeting specially convened. The necessary consents of the members may be given before the adoption of the Act by the town council.⁴ The town council may not exercise their powers of supplying gas, where such a non-statutory company is already supplying gas, without giving the company notice that they are willing to treat for the purchase of the company's undertaking. If the company consents the undertaking is transferred on terms mutually agreed, or, failing agreement, fixed by arbitration in the manner provided by the Lands Clauses Acts. The price is fixed on the basis of the undertaking being sold as a going concern.⁵ Failing consent of the company to sell within a period of two months, the town council obtain a decerniture from the Sheriff, whereupon they may exercise all the powers of the Act.⁶ The consideration given for the purchase may be a capital sum of money or annuities, or partly a capital sum of money and partly annuities, provided the annuities shall be limited to expire within forty years from the date of the purchase.⁷ If the town council purchase the undertaking of a non-statutory company the company cannot carry on the business of supplying gas in competition with the town council after the undertaking is vested in the town council.⁸

SUBSECTION (6).—*Borrowing Powers.*

1191. The town council may borrow on mortgage any money which may be necessary for the purchase or erection of gasworks for a burgh, and they may mortgage in security the rates or charges leviable by them under the provisions of the Act.⁹ They may also borrow from a bank on similar security on credit of a cash account.¹⁰ The sums borrowed must be applied in the payment of the mortgage and other debts of the company, and in carrying the other purposes of the Act into execution. Money borrowed must not be applied to the maintenance of works acquired or to be constructed or to the expenses of management or to

¹ Burghs Gas Supply (Scotland) Act, 1876, s. 2; *Mags. of Gourock, Petrs.*, 1911, 2 S.L.T. 288. ² 1876, s. 19. ³ *Ibid.*, s. 20.

⁴ *Browns v. Kilsyth Police Commrs.*, 1886, 13 R. 515.

⁵ See *Perth Gas Co. v. Perth Corporation*, [1911] A.C. 506; *Hamilton Gas Co. v. Hamilton Corporation*, [1910] A.C. 300. ⁶ 1876, s. 21.

⁷ *Ibid.*, ss. 22, 23.

⁸ *Ibid.*, ss. 25, 26.

⁹ *Ibid.*, ss. 27–29.

¹⁰ *Ibid.*, s. 30.

any other expenses properly payable out of revenue.¹ The Act contains provisions as to the form and execution of mortgages and discharge thereof and the payment of interest thereon,² and incorporates the provisions of the Commissioners Clauses Acts, 1847, with respect to mortgages except where expressly varied by the Act, and excepting ss. 84 and 85 thereof.³ Subject to certain conditions, the undertaking may be placed under a judicial factor, on the application of an annuitant or mortgagee.⁴

SUBSECTION (7).—*Guarantee Rate.*

1192. A rate termed “The Gas Contingent Guarantee Rate” may be levied to pay any annuities and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions and for the purposes of the Act, and, if the revenue of the gasworks be insufficient, to provide for any annual sums required to be set apart as a sinking fund, or any other annual expenditure incurred under the provisions and for the purposes of the Act.⁵ It is not the intention of the statute that this rate should be imposed in relief of gas consumers. It is for the security of mortgagees, to make good unavoidable deficiencies in the gas revenues.⁶ This assessment is imposed, levied, and collected on property situated within the burgh, along with and in the same manner as any assessment for police purposes.⁷

SUBSECTION (8).—*Sinking Fund.*

1193. In every year after the second year from their commencing to supply gas the town council must set apart as a sinking fund a sum of not less than one-fortieth part of the sums borrowed, until such sums are paid. The fund is only applicable to the redemption of mortgages and annuities, and must be lodged in a bank in Scotland incorporated by Act of Parliament or Royal Charter, or invested in Government or heritable securities until so applied.⁸

SUBSECTION (9).—*Gas Rents.*

1194. The Act does not contemplate the making of profits, and the clauses of the Gasworks Clauses Act, 1847, with respect to the amount of profit to be made by the undertakers do not apply.³ The price to be paid for gas to be supplied during any succeeding year or half-year, and until such price is altered, is fixed so as, as nearly as can be estimated, to raise sufficient income to discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest on all money borrowed in respect of the works, and to provide the sinking fund required by the Act, and to

¹ 1876, s. 37.

² *Ibid.*, ss. 28, 29, 31, 34, 35, and Schedules.

³ *Ibid.*, s. 6.

⁴ *Ibid.*, ss. 32, 33.

⁵ *Ibid.*, s. 38; 8 & 9 Geo. V. c. 45, s. 1.

⁶ See para. 1194, *infra*.

⁷ 1876, s. 39. The burgh general assessment now comes in place of the assessment for police purposes, 55 & 56 Vict. c. 55, s. 5 (2).

⁸ 1876, s. 40.

provide for a depreciation and renewal fund sufficient to maintain the works in perpetuity, and for all charges incident to the occupation of such works. The moneys received in respect of and incident to the manufacture and distribution of gas must be applied to such purposes only, and any balance at the end of a year is carried to the debit or credit of the succeeding year. The prices charged for gas must be the same to all consumers under like circumstances, and the revenue of the gasworks must be credited with an amount for the gas consumed for public purposes, calculated at the rates charged to private consumers, which amount shall be a charge upon the rates leviable for public lighting.¹ The prices for gas are intended to be fixed so as to give the highest possible yield of revenue necessary to meet the expenses of and charges on the undertaking. The object of the legislature is to make the undertaking self-supporting. If there is a deficit the guarantee rate can be resorted to only where it is impossible to raise the price to the consumer without producing a falling off in the gross receipts.²

SUBSECTION (10).—*Breaking up Streets, etc.*

1195. The Gasworks Clauses Act, 1847,³ applies except where at variance with the provisions of the Act of 1876. The latter Act provides that when for the purposes of the Act the town council require to break up a street under their control they are not required to give any notice of their intention to do so.⁴ The definition of "street" in the Act of 1876 differs somewhat from the definition in the Gasworks Clauses Act. If the road or street is outside their area, as in a case of supply under ss. 42 and 43, notice to the road authority is required.⁵

SUBSECTION (11).—*Supply of Gas.*

1196. The town council, on the request in writing of the owner or occupier of any building or part of a building within one hundred yards of which any main is laid, must, under penalty for failure, furnish to such owner or occupier a supply of gas for such building or part of a building on condition that the person, if required, gives reasonable security for the gas to be supplied, pays for the cost of laying pipes from the main, and, if required, pays in advance the estimated cost of laying the pipes.⁶ Any dispute under this section falls to be determined by the Sheriff. The town council may also supply internal fittings in any building with the consent of the owner or occupier thereof.⁷ The town council may also contract with any local authority adjacent to the burgh to supply gas within their district, provided that at the date of the passing of the Act of 1876 there was no town council or police commissioners or gas company entitled to supply gas within such district.⁸ This section appears to relate to adjacent burghs. They

¹ 1876. s. 41. ² *Milne v. Commrs. of Lockerbie*, 1894, 21 R. 940. ³ Para. 1169, *supra*.

⁴ 1876, s. 44. ⁵ *Kirkcaldy District Committee v. Buckhaven Gas Commrs.*, 1925 S.N. 54.

⁶ 1876, s. 45.

⁷ *Ibid.*, s. 46.

⁸ *Ibid.*, s. 42.

may, under s. 43, supply any district adjacent to the burgh not being at the time of the adoption of the Act within the area of supply of a statutory company, town council, or other commissioners. Consumers of gas supplied must consume the gas by meter.¹ The meter is subject to inspection by an officer appointed by the town council, and he may at all reasonable times enter any building or land lighted with gas so supplied in order to inspect the meters, fittings, and works for the supply of gas.² The register of the meter is *prima facie* evidence of the quantity of gas consumed.³ Notice must be given in the case of putting up and removing meters.⁴ Meters must be kept in repair by the consumer, unless hired by the town council on other terms as to repair.⁵ Penalties are imposed for fraudulently injuring or altering the index of meters, and in case of wilful waste of gas the town council may cut off the supply and sue for damages.⁶ These provisions supersede the provisions of the Gasworks Clauses Acts so far as inconsistent therewith.⁷ But additional provision is made for the recovery of gas charges and meter rents.⁸

SUBSECTION (12).—*Quality of Gas, etc.*

1197. The gas supplied to any consumer of gas must be supplied at such pressure as to balance a column of water from midnight to sunset not less than six-tenths of an inch, and from sunset to midnight not less than eight-tenths of an inch in height at the main, as near as may be to the junction therewith of the service pipe supplying such consumer.⁹ The gas must be at least of such quality as to produce, from a union jet or other burner approved by the Board of Trade, a light equal in intensity to the light produced by fourteen sperm candles of six in the pound burning one hundred and twenty grains per hour.¹⁰ The town council must maintain an apparatus to test the illuminating power and purity of the gas as prescribed by the Gasworks Clauses Act, 1871.¹¹ Any person appointed by the Sheriff for the purpose may test the pressure and open up the street for that purpose, and any competent person appointed by five gas consumers may test the power and purity of the gas, in both cases subject to the provisions of the Act.¹² The costs of such experiments are paid according to the result of the examination as determined by the Sheriff.¹³

1198. The statutory requirements as to illuminating power and pressure may be superseded as the result of an application by the town council to substitute a prescribed standard of calorific power in place of the standard of illuminating power under the Gas (Standard of Calorific Power) Act, 1916,¹⁴ or upon an application under the Gas Regulation Act, 1920, to supply gas upon a therm basis.¹⁵

¹ 1876, s. 47.

² *Ibid.*, s. 48.

³ *Ibid.*, s. 52.

⁴ *Ibid.*, s. 49.

⁵ *Ibid.*, ss. 50, 51.

⁶ *Ibid.*, ss. 54, 55.

⁷ *Ibid.*, s. 6.

⁸ *Ibid.*, ss. 51, 61.

⁹ *Ibid.*, s. 56.

¹⁰ *Ibid.*, s. 57.

¹¹ *Ibid.*, s. 58; see para. 1174, *supra*.

¹² 1876, ss. 56, 59.

¹³ *Ibid.*, ss. 59, 60.

¹⁴ 6 & 7 Geo. V. c. 25; para. 1197, *supra*.

¹⁵ 10 & 11 Geo. V. c. 28; para. 1179, *supra*.

SUBSECTION (13).—*Recovery of Penalties.*

1199. The recovery of penalties is provided for by s. 63 of the Act. The provisions of the Gasworks Clauses Acts would appear also to apply to such recovery.¹

SECTION 6.—PROVISIONS AS TO GAS IN BURGH POLICE
(SCOTLAND) ACT, 1892.

1200. The Burgh Police Act is concerned mainly with public lighting. Sec. 99 provides that the town council shall make provision for lighting in a suitable manner all the streets, and all other places within the burgh, which in their judgment should be lighted at the public expense, and shall provide, erect, and maintain such a number of lamps, lamp-posts, and lamp-irons and other appurtenances, as may be necessary for that purpose, and shall light, or shall enter into contracts for lighting, and cause to be lighted, such lamps by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same, as they may find expedient; and the town council are authorised to order the lamp-irons, lamp-posts, and lamps to be fixed, either upon the sides of the causeways, streets, and roads, or upon the kerbstones of the pavements or footways, or at or upon the rails, or in or upon the walls or buildings on the sides of the streets, as they shall think proper, without being liable to any claim for compensation thereanent. It has been suggested that under this section the town council might set up gasworks exclusively for the public lighting of the streets and other places.² In the absence of gas oil lamps may be used.³

1201. The Gasworks Clauses Act, 1847, the Gas and Water Works Facilities Act, 1870, the Gasworks Clauses Act, 1871, and the Gas and Water Facilities Act (1870) Amendment Act, 1873, and any Act amending the said Acts, are, except in or so far as they are expressly varied by the Burgh Police Act, 1892, incorporated with it.⁴ The town council may apply for additional powers in the matter of gas supply by way of provisional order under ss. 45 and 46 of the Act. Under s. 149 they are given certain limited powers to have the levels of gas pipes altered in new streets.

1202. Provision is made for fixing the price of gas between the town council and any authorised undertakers supplying gas within the burgh. Disputes are fixed by arbitration under the Lands Clauses Acts, unless special provision is made otherwise in a local Act authorising the supply of gas for public lamps.⁵ The town council are also empowered to provide suitable places and instruments for testing gas supplied by manufacturers of gas within the burgh, and are bound to supply such

¹ See para. 1172, *supra*.

² Muirhead, *Municipal Government*, 3rd ed., p. 343.

³ *Fleming v. Liddesdale District Committee*, 1897, 24 R. 281.

⁴ 1876, s. 99.

⁵ *Ibid.*, s. 102; cf. Gasworks Clauses Act, 1871, ss. 24–27.

places and instruments where the gas is supplied by themselves. On application by the town council or seven ratepayers the Sheriff shall appoint an examiner to make the necessary tests.¹ The other provisions relating to gas are matters of police administration in connection with the lighting of private stairs and courts and the breaking of lamps.

SECTION 7.—SPECIAL DISTRICT LIGHTING.

1203. Under the provisions of s. 44 (1) (a) of the Local Government (Scotland) Act, 1894, special districts may be formed in a county for lighting purposes, and for the adoption for such purposes of all or any of the provisions of ss. 100–105 of the Burgh Police (Scotland) Act, 1892. When a lighting district is formed the district committee may adopt the Burghs Gas Supply (Scotland) Acts, 1876 to 1918; but in such case the provisions of the Local Government (Scotland) Act, 1889, with respect to capital, expenditure, borrowing, and audit of accounts apply in lieu of the corresponding provisions in the Burghs Gas Supply Acts. In interpreting these Acts the expression “burgh” is to be taken as meaning special lighting district; “commissioners,” “town council,” and “commissioners of police” as meaning district committee; and “elector” and “ratepayer” as meaning a person registered as a county elector, the subject of whose qualification is within the special lighting district.²

¹ 1876, s. 103. The powers in this and the last section are qualified now by the provisions of the Gas Regulation Act, 1920; see para. 1180, *supra*.

² Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 44 (10).

GAZETTES.

See EVIDENCE.

GENERAL ASSEMBLY.

See CHURCH.

GENERAL AVERAGE.

See AVERAGE; CARRIAGE BY SEA.

GENERAL DISPOSITION.

See DISPOSITION.

GENERAL SERVICE.

See BRIEVE; COMPLETION OF TITLE.

GENERAL SHIP.

See CARRIAGE BY SEA.

GERMAN.

See KINSHIP.

GESTIO PRO HÆREDE.

See PASSIVE TITLE.

GIFT.

See DONATION.

GIPSIES.

See VAGRANT.

GLEBE.

See CHURCH.

GOLD AND SILVER.

GOLD PLATE.

See CROWN; EXCISE.

GOLFING.

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GOODWILL.

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SECTION 1.—INTRODUCTION.

1204. Goodwill may be described in general terms as the sum of those elements in an existing and well-established business which warrant a reasonable expectation that it will be able to attract to itself and retain customers to a greater degree than could a newly started, but otherwise precisely similar, business. Goodwill in this sense may be regarded as attaching to any or all of three factors of such a business.¹

1205. (1) Goodwill may be local, *i.e.* associated with the premises in which the business is carried on, being “the advantage which is acquired by an establishment, beyond the value of the capital and fixtures employed therein, in consequence of the general public patronage which it receives from habitual customers on account of its local position or reputation of celebrity and comfort, or even from ancient partialities.”² There are classes of trade as to which experience shews that, even where premises are otherwise equally adapted to the trade, the fact that business is already established in particular premises gives to these an advantage over any other, and the possibility of this must not be left out of account in dealing with the valuation of premises.³ See

¹ Clarke on Partnership, i. 430.

² Per Lord Fraser in *Drummond v. Leith Assessor*, 1886, 13 R. 540.

³ See para. 1269 *et seq.*, *infra*.

VALUATION AND RATING. This local aspect bulked largely in the earlier decisions, notably in the view taken of goodwill by Lord Eldon, who may be said to have been the first judicially to recognise goodwill in the legal sense. Indeed in *Cruttwell v. Lye*¹ he is reported to have said that the goodwill which had been the subject of sale was "nothing more than the probability that customers will resort to this old place." In *Pearson v. Pearson*² this dictum was much relied on by Cotton L.J., and in *Trego v. Hunt*³ it was pressed in argument as if it amounted to a definition of goodwill. But the learned Lords who took part in the judgment of the House of Lords in the case last mentioned declined so to treat it, Lord Herschell observing, "If the language of Lord Eldon is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon to be an exhaustive definition."⁴ But of course "local" goodwill is still of considerable importance, especially in connection with retail concerns, and, among these, notably in businesses connected with licensed premises. In some cases goodwill may be entirely separable from premises and may so be sold. But it cannot be separated from the business.

1206. (2) Goodwill may be personal, *i.e.* bound up with the personality of the party who has built up the business. This is mainly important in regard to the practices of professional men. In these indeed the personal element occasionally becomes so strongly marked as to do away with the possibility of transferring the goodwill apart from personal stipulations as to non-competition and introductions.⁵

1207. (3) Goodwill may attach to what, for want of a better expression, may be termed the "connection" of a going business. "One of the most important things in a business is its trade connection. Not merely the connection with persons to whom the owner of the business sold, but with the wholesale houses and merchants from whom he bought."⁶ It is as pertaining to this element of connection that goodwill is chiefly of value as a subject of commerce in the case of wholesale concerns. In the case of a great shipping business, *e.g.*, it has been found that neither change of locality nor of persons is of any great moment where the "connection" (including the old name) remains. In a case⁷ in which about six weeks after the owner's death his executrix (his widow) sold the goodwill of his business to her son, and about ten months after his death also sold the small residue of the trading stock, it was observed by the Lord President (Clyde) that a business does not cease (in the sense of the Finance Act, 1918⁸) merely because of such a sale or of a transmission on the death of the owner to his personal representa-

¹ 1810, 17 Ves. 335.

² 1884, 27 Ch. D. 145.

³ [1896] A.C. 1, at p. 9.

⁴ [1896] A.C. at p. 17; see also per Lord Macnaghten at p. 23, and per Lord Davey at p. 27.

⁵ Per Lord Fraser, in *Drummond v. Leith Assessor*, 1886, 13 R. 540.

⁶ *Morrison v. Morrison*, 1900, 2 F. 382, per Lord Pres. Balfour at p. 383.

⁷ *Guest's Exr. v. Inland Revenue*, 1921 S.C. 440, at p. 445.

⁸ 8 & 9 Geo. V. c. 15, s. 35 (1) and (2).

tives; and that he was not satisfied "that a business necessarily ceases because, although the goodwill is sold to a purchaser who intends to continue trading with the old customers, the bulk of the trading stock and the book debts are retained for realisation otherwise." The Lord President contemplates that in such a case the business carried on by the purchaser with the old customers may be a continued carrying on of the old business. This definitely recognises the possible independence of goodwill from any element of existing stock or book debts.

1208. On strict analysis, no doubt, in practically every case of goodwill there is an element present pertaining to each of the three factors mentioned. But for the proper understanding and reconciliation of many of the modern cases it is essential to keep in view the fact that goodwill may be so closely identified with one of the three as, for legal purposes, to render those portions of it which attach to the other two negligible quantities.

1209. The law regulating goodwill is, comparatively speaking, modern in its origin and growth. Transactions in what was practically goodwill were, however, well known in the market-place long before goodwill itself had come to be seriously considered and defined by the Courts. Under the conditions of trade prevalent in earlier times such transactions were naturally bound up with personal agreements restrictive of competition, and it is mainly on these that the older cases bear.¹ As stated above, Lord Eldon is entitled to the credit of having practically founded this branch of the law. He had occasion to consider goodwill in a number of cases, and he formally embodied his conclusions in a series of "declarations" in the early leading case, *Cruttwell v. Lye*.² These "declarations" have been amplified and developed in a voluminous series of later decisions (chiefly English), as the result of which goodwill has come to be recognised as constituting an element in a business which is in itself a definite subject of property, and one which has value, is susceptible of transfer, and has attached to it incidents of its own quite apart from any personal stipulations by which the transferor may become bound. To goodwill in this strict sense attention is in this article confined, so far as may be—the law regulating those personal pacts which are so frequently embodied in transfers of goodwill being more appropriately treated under RESTRAINT OF TRADE.

SECTION 2.—NATURE OF GOODWILL.

1210. Connection with a particular trade or business which is at the time being carried on is essential to goodwill; without this it can have no existence.³ Once established, however, in connection with such a business, it is treated as a species of property susceptible of money valuation, capable of being transferred, and subject generally to the ordinary incidents of ownership. Many definitions have been given of goodwill. But

¹ *E.g. Stalker v. Carmichael*, 1735, Mor. 9455.

² 1810, 17 Ves. 335.

³ *Robertson v. Quiddington*, 1860, 28 Beav. 535, per Lord Romilly M.R.

how elusive it is of precise or exhaustive definition may be gathered from the observations of Lord Sumner in *Wankie Coal Co. v. I.R. Commissioners*:¹ "The owners of a business fluctuate, they come and go with changes in partnerships, assignments, reconstruction, and so forth—but the identity of the business remains, and may be one of its most important assets." Goodwill may be said to be in any given case the sum of the elements which in that particular case constitute this "identity." For practical purposes probably the best working definitions are to be found in two leading cases, *Churton v. Douglas*² and *Trego v. Hunt*.³ In the former case Wood V.-C. (afterwards Lord Chancellor Hatherley) defined it as "every positive advantage, as contrasted with the negative advantage of the late partner" (or owner) "not carrying on the business himself, that has been acquired by the firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter connected with the benefit of the business." In *Trego v. Hunt*⁴ Lord Herschell approved this definition, adding: "It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has a goodwill." In the same case Lord Macnaghten said: "Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money."⁵ Other definitions will be found collected and commented on in Allan's Law of Goodwill.⁶

SECTION 3.—RIGHTS CARRIED BY TRANSFER OF BARE GOODWILL.

1211. The rights which may be obtained by one acquiring bare goodwill, unaccompanied by any personal agreements imposing restraint on the transferor, fall under one or other of two general classes, namely (1) rights to possession of old premises and stock, and (2) the right to carry on the old business and to represent that it is being carried on by the transferee.

SUBSECTION (1).—*Rights to Possession of Old Premises and Stock.*

1212. As already indicated, goodwill is in some cases closely identified with the possession of certain specified premises; and it may be so even to such an extent as to leave practically no other marketable element which can be disposed of apart from the right to the premises.⁷ The

¹ [1920] A.C. 66, at p. 69.

² 1859, John. 174.

³ [1896] A.C. 7.

⁴ *Ibid.*, at p. 17.

⁵ *Ibid.*, at p. 24.

⁶ P. 6 *et seq.*

⁷ Cf. *e.g. Philp's Exr. v. Philp's Exr.*, 1894, 21 R. 482.

local goodwill so attaching passes to the party acquiring right to the premises, as a pertinent of these.¹ A mortgagee of the premises may thus acquire the benefit of goodwill.² But it seems open to question whether one acquiring the premises otherwise than by title derived from a former trader would be entitled to represent himself as the successor in business of the latter. On the other hand, where a trader transfers goodwill, the mere transfer seems to carry such right as the vendor has in the premises, and this even in the case of gratuitous transfer, such as bequest.³ Where the premises are merely leased, the reversion of the lease will be carried.

1213. Where the tenant has no right other than a yearly tenancy, a sale of goodwill would seem to carry by implication the vendor's introduction to the landlord, and interest in obtaining a renewal.⁴ In the case first cited the widow and executrix of a publican with a yearly tenancy, who had obtained a transfer of the licence, and a fresh let from the landlord, was sued by a creditor of her husband's as *lucratus* by the goodwill of the business. Lord Kyllachy held that the limit of her liability was the amount which might have been obtained for the goodwill from a purchaser taking it merely as an introduction to the landlord and in the knowledge that the widow was to be a competitor.

1214. The reputation of the trader may add to the local value of goodwill, but the transfer of premises in which a business has been built up, made by any other than the trader who has built it up (or one in his right), would not seem to bar the latter from separately transferring that element of goodwill which is founded upon reputation and connection, if this could, without fraud on the public, be maintained in connection with other premises suitably situated.⁵

1215. In *Leishman v. Glen & Henderson* ⁶ Lord Kincairney observed: "I do not think it is settled as an abstract proposition that the goodwill of a public-house is wholly heritable. I think its character may depend on circumstances." Any goodwill which attaches to a house from its being well known or situated in a good thoroughfare adds to the value of the house and would pass to, *e.g.*, a mortgagee getting a mortgage of the house; but the goodwill which attaches to the personal reputation of the owner of the house would not pass to such a mortgagee.⁷ One finds similarly in English decisions that in the case of a public-house while in

¹ *Bain v. Munro*, 1878, 5 R. 416; *Bell's Tr. v. Bell*, 1884, 12 R. 85; *Brown v. Robertson*, 1896, 34 S.L.R. 570; *Rutter v. Daniel*, 1882, 30 W.R. 269; *Booth v. Curtis*, 1869, 20 L.T. 152; and see cases cited in Allan, *Law of Goodwill*, p. 14.

² *Chissum v. Dewes*, 1828, 5 Russ. 29; *Pile, ex parte Lambton*, 1876, 3 Ch. D. 36; but see also *ex parte Punnett, in re Kilchin*, 1881, 16 Ch. D. 226.

³ *Blake v. Shaw*, 1859, John. 732.

⁴ *Brown v. Robertson*, *supra*.

⁵ See *Philp's Exr. v. Philp's Exr.*, 1894, 21 R. 482, per Lord Young at p. 488 and Lord Rutherford Clark at p. 490.

⁶ 1899, 6 S.L.T. 328.

⁷ Per Cotton L.J. in *Cooper v. Metropolitan Board of Works*, 1884, 25 Ch. D. 472; see also *Town and County Bank v. Murdoch's Factor*, 1902, 9 S.L.T. 485; *Graham v. Graham's Trs.*, 1904, 6 F. 1015; *Muirhead's Trs. v. Muirhead*, 1905, 7 F. 496.

general the right to the house and the advantages of situation do enter largely, if not preponderatingly, into the value of goodwill, yet it is recognised that goodwill may even in this case be for practical purposes exclusively an incident of the stock and the possession of the licence.¹ Thus, *e.g.*, in the case of a popular licensee with a reputation for a well-selected stock it might make very little, if any, difference in the value of the business that he had to transfer it from one particular house to another. Conversely, circumstances may occur in which the holder of a licence may be bound to assign the licence as being really an incident of the element of goodwill attaching to possession of the house.²

1216. In the case of a sale of a newspaper business, "with full benefit of pending contracts and engagements, and of all other property to which the vendors are or may be entitled in connection with it," it was held that the purchasers took not merely an option of acquiring current contracts, but the contracts with all their liabilities, and that they were bound to indemnify the sellers against them.³ A provision in an Act of Legislature for the transfer of "gas works and plant" was held to include not merely the works in a material sense, but the undertaking as a going concern.⁴ In the absence of express stipulation it was held that a sale of a business of tailors and clothiers carried as an incident thereof a right to all business books and documents.⁵ But it was said by Denman J. in the case of *James v. James*⁶ that the cases appear to establish that "in the absence of clear and specific stipulation, an assignment of the goodwill of a solicitor's business does not carry with it the right to the custody of the client's deeds and papers." This observation was *obiter*, as it did not enter into the grounds of the decision. Of course no assignment express or implied can carry any right to custody of a client's papers apart from his assent. But whether the assignment carries such right as the transferor may have and be able to pass would seem to be a question of construction to be decided in any particular case, not necessarily by the presence of a special stipulation, but by the circumstances and terms of the contract as a whole, including any usage which there may be in the profession. At the same time it is well in framing any formal assignation to have regard to and provide for the right to custody of such papers in accordance with the intention of the parties. For other expressions which have been held sufficient to carry goodwill, see the cases of *David & Matthews*⁷ and of *Jennings v. Jennings*.⁸

¹ See *e.g. England v. Downes*, 1842, 6 Beav. 269; *Booth v. Curtis*, 1869, 20 L.T. 152.

² *Rutter v. Daniel*, 1882, 30 W.R. 801; but see also *Bennett, ex parte in re Kitchen*, 1881, 16 Ch. D. 226.

³ *Bowater v. Miroir of Life Co.*, 1902, 50 W.R. 381.

⁴ *Hamilton Gas Co. (New Zealand) v. Hamilton Corporation*, [1910] A.C. 300.

⁵ *Morrison v. Morrison*, 1900, 2 F. 382.

⁶ 1889, 60 L.J. Q.B. 569 and 572; 22 Q.B.D. 669.

⁷ [1899] 1 Ch. 1227; see para. 1227, *infra*.

⁸ [1898] 1 Ch. 1231; see para. 1231, *infra*.

SUBSECTION (2).—*Right to Carry on the Old Business, and to Represent that it is being Carried on by the Transferee.*

1217. The purchaser¹ or other transferee² acquires a right to carry on the old business, and to represent that it is the identical business which is being so carried on. This right is exclusive;³ and it infers in the transferee a right to sue for damages, or to obtain interdict against anyone (including a vendor) unlawfully infringing it.⁴ This main right includes, as incidental to itself (1) the sole right of use of the old trade name, (2) the right to the exclusive use of trade marks, (3) the benefit of agreements in restraint of trade, and (4) the right, in the absence of stipulation to the contrary, to delivery of the business books of the owner.⁵

(i) *Use of the Old Trade Name.*

1218. It follows from *Churton v. Douglas*,⁶ and has since that case been accepted law, that among the advantages carried by transfer of goodwill is included every advantage incidental to the trade name.⁷ This equally applies whether the name be that of a proper firm, or of a periodical or newspaper,⁸ or the name attached to business premises,⁹ or of a trade specialty.¹⁰ This right is in general exclusive against all the world, the party who acquires the business getting the name as essential for preventing the public from being deceived.¹¹ It is upon this ground that he is entitled to interdict against such use as might (intentionally or otherwise) deceive the public. It even seems unnecessary to aver fraud.¹² In the case of *Rosher v. Young*,¹³ in which a dissolution agreement provided for the assignment of goodwill, including the right to the use of the firm-name, but stipulated that the assignor should have the right to use the name as soon as the assignees should cease to trade under it, it was decided after the assignees had parted with the goodwill to another, that the assignor became entitled to use the firm-name himself, the assignee of the goodwill having, however, also right to it; and it was held that the latter could not be restrained from legitimately using the name even although the result might occasion confusion and delay to the complainer. A mortgagee who acquires right to the premises, but who has not used, and does not intend to use the name, is not entitled to interdict against others deriving title from the mortgagor.¹⁴ Indeed, it seems doubtful on principle whether he has

¹ *Crutwell v. Lye*, 1810, 17 Ves. 335.

² *E.g. Blake v. Shaw*, 1859, John. 732.

³ *Hogg v. Kirby*, 1803, 8 Ves. 215; *Churton v. Douglas*, 1858, John. 174.

⁴ *Walker v. Mottram*, 1882, 19 Ch. D. 355, 363; *Burrows v. Foster*, 1862, 1 N.R. 156.

⁵ *Morrison v. Morrison*, 1900, 2 F. 382. ⁶ *Supra*.

⁷ *Cp. per Wood V.-C., loc. cit., and Levy v. Walker*, 1879, 10 Ch. D. 436, 445.

⁸ *Bradbury v. Dickens*, 1859, 27 Beav. 53; *Longman v. Tripp*, 1863, 2 N.R. 67.

⁹ *Hudson v. Osborne*, 1870, 39 L.J. Ch. 79.

¹⁰ *Mitchell v. Condry*, 1878, 37 L.T. (N.S.) 268, 766.

¹¹ See *Smith v. MacBride*, 1888, 16 R. 36.

¹² Per Giffard L.J. in *Lee v. Haley*, 1870, L.R. 5 Ch. 161.

¹³ 1901, 17 T.L.R. 347.

¹⁴ *Beazley v. Soares*, 1882, 22 Ch. D. 660.

any right himself to use the name except where, as above noticed, the goodwill is essentially local.

1219. The purchaser must merely hold himself out as succeeding to and continuing the business of his authors. He must not identify himself with them. In England, it has been held that a person who has traded with the successor under the belief that he is dealing with the transferor, is entitled to resile from his contract; ¹ but *quære* whether, in Scotland, such error, apart from fraud, would necessarily be considered so essential as to justify reduction save in an exceptional case. Even in England, interference by way of injunction seems incompetent.² The assignors are, moreover, entitled to have the name so used as not to expose them to risk.³ But failure to apply for restraint does not *per se* infer liability on the transferors for contracts subsequent to the transfer, provided the transfer has been duly notified; ⁴ and the right to such interdict is entirely personal to the transferors, and will not be enforced where the goodwill is derived from a deceased partner who can no longer be supposed to be the party dealt with. Similarly there can be no ground for restraining the purchaser ⁵ where the transferor has changed her name by marriage; ² nor where the assignee prefixes "late" before the old name.⁶ On the dissolution of a solicitor's business where no provision was made for the use of the firm-name, but the goodwill, apart from the firm-name, was not to be sold but divided between the partners, each partner was held to be at liberty to use the firm-name in such a way as not to hold out his late partners as being still partners with him in the business. It was held that merely to use the old firm-name (even although that name was also the name of the late partner) did not necessarily amount to such holding out.⁷

1220. As to the use of the former firm-name by one entitled to goodwill, see also the cases undernoted.⁸ In the last case cited it was observed that there was no "holding out" which would justify interference by a former partner through the use of a firm-name which was not that of the individual complaining, and that having regard to the circumstances of the case this applied although the firm-name embodied that of the individual as part of it. In *Townsend's* case part of the assets sold consisted of a shop, in the front of which was carved the personal name of the vendor. There being no stipulation that the purchaser should obliterate this, it was held that there was no equity which entitled the vendor to insist upon his doing so although the purchaser would not have been entitled to trade otherwise in that name.

¹ *Boulton v. Jones*, 1858, 2 H. & N. 564; *Cundy v. Lindsay*, 1878, 3 App. Cas. 459, 465.

² *Cp. Levy v. Walker*, 1879, 10 Ch. D. 436, per James L.J. at p. 448.

³ See cases cited in Allan on Goodwill, p. 23, note (h).

⁴ *Newsome v. Coles*, 1811, 2 Camp. 617.

⁵ *Webster v. Webster*, 1791, 3 Swans. 490.

⁶ *Churton v. Douglas*, 1858, John. 174.

⁷ See *Burchell v. Wylde*, [1900] 1 Ch. 551.

⁸ *Jacoby v. Whitmore*, 1884, 49 L.T. (N.S.) 335; *Automobile Carriage Builders v. Sayers*, 1909, 101 L.T. 419; and *Townsend v. Jarman*, [1900] 2 Ch. 698.

(ii) *Use of Trade Marks.*

1221. By the Trade Marks Act, 1905,¹ it is provided that: "A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it is registered and shall be determinable with that goodwill. But nothing in this section contained shall be deemed to affect the right of a proprietor of a registered trade mark to assign the right to use the same in any British possession or Protectorate or foreign country in connection with any goods for which it is registered together with the goodwill of the business therein in such goods." It is clear, therefore, that, in harmony with the policy of guarding the public from fraud, the trade marks of a concern can only be passed in connection with goodwill. Such a mark cannot exist apart from a business.² It seems also settled that, unless where so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual, the trade marks pass both under such general assignments as include goodwill, and on the transfer of mere goodwill by itself.³ In *Churton v. Douglas* ⁴ Page-Wood V.-C., in the opinion already cited, expressly treats firm-names and trade marks as ruled by identical principles in this respect, and treats both as passing as incidents of the transfer of mere goodwill. By s. 23 of the Act of 1905 it is, however, provided that "in any case where from any cause, whether by reason of dissolution of partnership or otherwise, a person ceases to carry on business, and the goodwill of such person does not pass to one successor but is divided, the registrar may (subject to the provisions of this Act as to associated trade marks ⁵) on the application of the parties interested, permit an apportionment of the registered trade marks of the person among the persons in fact continuing the business, subject to such conditions and modifications, if any, as he may think necessary in the public interest. Any decision of the registrar under this section shall be subject to appeal to the Board of Trade." The party acquiring right must register his title.⁶

(iii) *Benefit of Agreements in Restraint of Trade.*

1222. The benefit of a restrictive covenant taken to secure goodwill passes *quantum valeat* to an assignee of the goodwill. Even where a transferor himself undertakes no personal obligation in favour of the transferee, there may be such obligations restraining third parties from trading, associated with and already in existence for the protection of the business. In so far as these are lawful at all (on which see

¹ 5 Edw. VII. c. 15, s. 22.

² *Cotton v. Gillwood*, 1875, 44 L.J. Ch. 90; *Ex parte Lawrence Bros.*, 1881, 44 L.T. (N.S.) 98.

³ Cp. *Cooper v. Hood*, 1859, 26 Beav. 293, per Romilly M.R.; *Hall v. Burrows*, 1863, 4 De G. J. & S. 150; *Burry v. Bedford*, 1864, 4 De G. J. & S. 352; *Clements v. Shipwright*, 1871, 19 W.R. 599.

⁴ 1858, John. 174.

⁵ Secs. 24 to 27.

⁶ 5 Edw. VII. c. 15, s. 33.

RESTRAINT OF TRADE), or are not purely personal, they are transferable to assignees; ¹ and apart from express assignation, they pass upon the assignment of goodwill, without more.² In *Westacott v. Brown* ³ this implied assignation was held to result from a transfer by the trustee on a bankrupt estate of a restraint which had been imposed for the benefit of the business—in this differing from a restraint on the selling owner himself carrying on afterwards a similar business.⁴ Where goodwill on a dissolution of copartnery is not sold, but divided between the partners,⁵ such restrictive agreements on third parties enure for the joint and several benefit of the partners, and cannot be discharged by any one of them.⁶ In the case of *Townsend v. Jarman* ⁷ it was observed that the fact of one or more but not all of the partners of a business being under a contractual restraint upon future competition may have the effect of increasing the value of the share of goodwill falling to be credited upon dissolution to the remaining partners who do not labour under the restraint.

1223. A contract by an actor in photographic plays with his employer, a producer of cinematograph films, that he will not use, after the termination of his engagement, the only name by which he is known in his profession and that that name shall be the property of his employer, is one which, if enforceable, is of a nature which would pass as an incident of the goodwill of the employer's business. But a contract on these terms was held to be in restraint of trade inasmuch as it imposed a serious handicap on the employee as depriving him of part of his professional equipment, and was treated as invalid as being wider than was reasonably necessary for the protection of the employer. It was observed that the exceptions to the rule of invalidity, where the power of bargaining has been used so as to obtain more than reasonable protection against the party in whose favour the covenant is taken, include the right to protect trade secrets attaching to a business and to prevent old customers being enticed away, but that they do not include protection against competition of an employee *per se*.⁸ But, in regard to non-enforceability as being in restraint of trade, a covenant exacted by a purchaser from a vendor on a sale of the goodwill of a business is on a different footing from a similar contract exacted against an employee. While it seems, indeed, that in the latter case a contract merely against competition *per se* would be unenforceable, in the former case it will generally be enforceable, inasmuch as the absence of competition is what gives to the thing sold a substantial part of its value, and therefore

¹ *Hitchcock v. Coker*, 1837, 6 A. & E. 438.

² *Benwell v. Irons*, 1857, 24 Beav. 307; *Jacoby v. Whitmore*, 1884, 49 L.T. (N.S.) 335; cp. per Brett M.R. and Bowen L.J. at pp. 337, 338; *Townsend v. Jarman*, [1900] 2 Ch. 698; *Automobile Carriage Builders v. Sayers*, 1909, 101 L.T. 419.

³ *Circa* 1889, an unreported case noticed by Allan, p. 31.

⁴ See paras. 1230 and 1249, *infra*.

⁵ See para. 1244, *infra*.

⁶ *Palmer v. Mallet*, 1887, 36 Ch. D. 411.

⁷ [1900] 2 Ch. 698, per Farwell J. at p. 702.

⁸ *Hepworth Manufacturing Co. v. Wernham Ryott*, [1920] 1 Ch. 1.

the power to sell an enforceable restraint is beneficial to the vendor by enabling him to obtain a higher price for the business.¹

(iv) *Right to Delivery of Business Books.*

1224. On the sale of a going business, in the absence of some express restriction or stipulation, things so essential to the successful prosecution of the business as business books and documents would be included. This covers all such books and documents of the nature of records of the buying and selling arrangements which go to make up the "connection" of the business.²

1225. Other rights necessarily following upon those already noticed will best appear in considering the position of a transferor of goodwill after transfer, which is dealt with in the next section.

SECTION 4.—POSITION OF TRANSFEROR OF GOODWILL AFTER TRANSFER.

1226. A trader compulsorily deprived of the goodwill of his business is identically, and a trader voluntarily parting with such goodwill is, save in one important particular, in the same position towards the party who has acquired his business as is any other member of the public. To the lay mind it may appear startling that if one buys or otherwise acquires a business and its goodwill, the transferor, unless restrained by some personal agreement, may immediately proceed to enter into competition with him—even by starting next door. This, however, is well settled law. In *Cruttwell v. Lye*³ the lawfulness of the late possessor of the business so doing was affirmed in the case of a judicial sale by the trustee on a bankrupt estate. The necessity or propriety of extending this rule to the case of a voluntary transferor has been more than once questioned by judges of eminence.⁴ But the rule is now too well settled to admit of doubt.⁵

1227. In exceptional circumstances a restraint on competition may, however, be implied.⁶ On the sale of goodwill as part of a firm's assets, it has been held to be equitable that express notice should be given in advertising the sale that absence of competition is not an element in the sale;⁷ and although this is probably not essential, it is desirable. The possibility of competition by the vendor is always a consideration which an agent for an intending purchaser ought to make clear to his

¹ See *Morris (Herbert), Ltd. v. Saxby*, [1915] 2 Ch. 57; [1916] 1 A.C. 688, per Lord Atkinson at p. 701, Lord Parker at p. 709, and Lord Shaw at p. 714.

² *Morrison v. Morrison*, 1900, 2 F. 382, per Lord Pres. Balfour.

³ 1810, 17 Ves. 35.

⁴ See per Lindley L.J. in *Pearson v. Pearson*, 1884, 27 Ch. D. 145; and Herschell L.C. in *Trego v. Hunt*, L.R., [1896] A.C. 7.

⁵ See *Cook v. Collingridge*, 1860, 27 Beav. 456; *Johnson v. Halleley*, 1864, 34 Beav. 63; *Churton v. Douglas*, *supra*; *Trego v. Hunt*, *supra*.

⁶ *Cooper v. Watson*, 1784, 3 Doug. 413; *Harrison v. Gardner*, 1816, 2 Madd. 198.

⁷ *Johnston v. Halleley*, 1864, 34 Beav. 63; *Hall v. Burrows*, 1864, 33 L.J. Ch. 204.

client. In the case of *David & Matthews*¹ provision was made for the survivor of the partners having right to purchase the whole business, and, for the purpose of working out this, a general account of the firm's property was to be made up for valuation, "including all the effects and securities." The arbiter chosen having applied to the Court for guidance as to whether under these words goodwill should be included, it was held that it fell to be valued on the footing that the surviving partner would be at liberty to carry on a rival business but would not have right to solicit customers of the old firm or to carry on under its style. In the report of this case there is a pretty full discussion of the rules applicable in case of dissolution of partnership.²

1228. In entering into competition, however, even where this is lawful, the transferor must refrain from in any way representing or even suggesting that he is carrying on the identical business, either by statements that he is the successor in trade to his former business, or by using the old trade marks or colourable imitations thereof, or by using his own name in such a way as to mislead, even along with the words "late" or "from";³ but if not done so as to mislead, he is not debarred from stating that he at one time carried on, or was a partner in, the business transferred.⁴

1229. The right of one who parts with a business by voluntary transfer to solicit the continued support of former customers was the subject of much controversy and of contradictory decisions in the lower Courts. It was at last authoritatively determined by the House of Lords in the case of *Trego v. Hunt*.⁵ In this case the House, reversing the judgment of the Courts below and overruling *Pearson v. Pearson*,⁶ and approving *Labouchere v. Dawson*,⁷ held that a voluntary transferor of goodwill is not entitled, in course of carrying on a business similar to that sold by him, to take advantage of the connection previously formed by the old firm, and of the knowledge of that connection which he has acquired, by directly and specifically appealing to those who were customers of him or his firm before the transfer. Such conduct, being contrary "to the good faith of the contract," will be ground for a Court of equity granting an injunction to restrain it.⁸ A partner who had access to the books and documents containing particulars of the business connection, but who was excluded by the terms of the contract of copartnership from any interest in goodwill, was therefore held liable to be restrained from copying or making extracts from the same in order that the copies or extracts so made might be used by him in a competing business upon the dissolution of the partnership. The cases which preceded *Trego v. Hunt*, although now superseded by the decision therein as regards this particular point, contain dicta which are invaluable as indicating

¹ [1899] 1 Ch. 378.

² See also *Innes v. Smith*, 1893, 1 S.L.T. 45; and para. 1243, *et seq.*, *infra*.

³ See cases cited in Allan on Goodwill, p. 63.

⁴ *Hookham v. Pottage*, 1873, 8 Ch. D. 91.

⁶ 1884, 27 Ch. D. 145.

⁵ [1896] A.C. 7.

⁷ 1872, L.R. 13 Eq. 322.

⁸ Per Lord Herschell in *Trego v. Hunt*, [1896] A.C. 7.

the evolution of the law of goodwill, and pointing to the appropriate solutions of questions still unsettled.¹

1230. The rule laid down in *Trego v. Hunt* does not extend to the case of one who is involuntarily deprived of goodwill. This case simply restored the law to the position in which it stood prior to the decision in *Pearson v. Pearson* which had overruled *Labouchere v. Dawson*, with which latter case the injunction granted in *Trego v. Hunt* is in terms identical. While *Labouchere v. Dawson* was still authoritative, it had been expressly held that it would be contrary to the policy of the Bankruptcy Laws to extend its principle to compulsory alienations under them;² and the ratio of the decision seems to extend to any other case of involuntary alienation.³ Thus the restriction upon competition does not extend to the granter of an assignment in trust for creditors,⁴ even although the granter of the assignment, (the trustee under which was the seller), bound himself to aid the trustee in the realisation of his estate.⁵ In this case, in an action by the trustee against the assignors to restrain them from canvassing for a third party C., it was held that restraint was not implied and that action against C. failed inasmuch as the assignors not being guilty of any wrong in canvassing, he was in no way debarred from employing them to do this. The principle of this decision apparently is similar to that which negatives the presumption that a bankrupt comes under personal restraint affecting his future conduct—any conveyance to or in trust for creditors by an insolvent being regarded as granted under compulsion.⁵ There seems to be nothing in *Trego* to throw doubt on the soundness of this view. And it has since been recognised and applied in *Dawson v. Benson*,⁶ in which it was observed that while alienation under the Bankruptcy Acts is in one sense voluntary, it must, for the purpose of alienation of goodwill, be regarded as involuntary. But the executors of a vendor carrying out a contract of sale of a business and goodwill are bound by the implied obligation undertaken by their author, the original seller, not to compete with the purchaser.⁷

1231. While a voluntary transferor may not solicit or specifically and directly appeal to former customers, it is well settled, despite some contrary dicta by Jessel M.R. in *Ginesi v. Cooper*,³ that he is nevertheless at liberty to deal with them if they of their own accord come to him.⁸ In the case of *Curl Bros. v. Webster*,⁹ the principle of *Trego's* case was indeed held to warrant restraint of a seller of goodwill from soliciting

¹ See *Crutwell v. Lye*, 1810, 7 Ves. 35; *Labouchere v. Dawson*, 1872, L.R. 13 Eq. 322 (in which restraint affirmed); *Walker v. Mottram*, 1882, 19 Ch. D. 355; *Ginesi v. Cooper*, 1880, 14 Ch. D. 596; *Pearson v. Pearson*, 1884, 27 Ch. D. 145 (overruling *Labouchere v. Dawson*, *supra*); cp. also *M'Kirdy v. Paterson*, 1854, 16 D. 1013, per Lord Benholme at p. 1014.

² See *Walker v. Mottram*, *supra*.

³ Cp. *Ginesi v. Cooper*, *supra*.

⁴ *Green & Sons (Northampton), Ltd. v. Morris*, [1914] 1 Ch. 562.

⁵ *Farey v. Cooper*, [1927] 2 K.B. 384.

⁶ 1882, 22 Ch. D. 504.

⁷ *Boorne v. Wicker*, [1927] 1 Ch. 667.

⁸ *Leggott v. Barrett*, 1880, 15 Ch. D. 306, in which the Court of Appeal reversed Jessel M.R.; cp. also per Lord Herschell in *Trego v. Hunt*, [1896] A.C. 7. ⁹ [1904] 1 Ch. 685.

or canvassing customers of his former firm, even although they had voluntarily dealt with him after the sale and prior to an approach on his part. But it was recognised that he was perfectly free to deal with them in so far as they came to him voluntarily; and there are indications in the judgment which suggest that if it could be shewn that they had on their own initiative definitely abandoned all dealings with the parties in right of the old business, such a restraint would not be enforceable after they had ceased to deal for such a time that any approach could not fairly be said to tend to divert their custom from the vendors. So, too, there seems no reason in principle why a vendor should not be permitted to solicit from former customers business of a kind which is not included within the scope of that formerly carried on by him.

1232. To sum up, a purchaser of goodwill acquires, as between himself and the vendor, the right (1) to carry on the old business, (2) under the old name (with any modification necessary to protect the vendor), (3) to represent himself to customers as the successor to the old business, (4) to use and have registered in his name the trade marks thereof, (5) to obtain delivery of business books and documents, and (6)—in the case of a voluntary alienation only—to restrain the vendor by interdict from “either by himself, his partners, agents, or servants applying privately by letter, or personally, or by traveller, to parties who prior to the sale were customers of the old business, with the view of inducing them to deal with himself, or not to deal with the vendee,”¹ subject to the qualifications noticed in the preceding paragraph. In the case of *Gillingham v. Beddow*,² in a transaction between partners, a term in the agreement that “nothing herein contained shall prevent either partner starting a similar business in the neighbourhood after the expiration of the partnership,” was held to amount merely to an expression of what would have applied apart from the clause; and it did not avail to exclude the principle of the decision in *Trego’s* case so as to permit of canvassing the customers of the partnership by one of the partners who did not claim to have any right to goodwill.³ A vendor may not canvass, on behalf of parties employing him in a business of a kind similar to that sold, customers of his former business whom he would be debarred from canvassing on his own account.⁴

SECTION 5.—RESTRICTIONS ON USE OF ELEMENTS OF GOODWILL BY EMPLOYEES.

1233. Analogous to the restrictions imposed on a seller of goodwill are those which have been recognised as applying to the case of one who, through the conditions of his employment, has necessarily made available to him access to some of those elements which go to make the value

¹ See terms of injunction in *Trego*. For construction of restrictions in a voluntary sale see *Morris (Herbert), Ltd. v. Saxby*, [1915] 2 Ch. 57; [1916] 1 A.C. 688.

² [1900] 2 Ch. 242.

³ See also *Jennings v. Jennings*, [1898] 1 Ch. 378.

⁴ *Dumbarton Steamboat Co. v. Macfarlane*, 1899, 1 F. 993.

of goodwill. An interesting summary of several cases of this class will be found in an article in the Scots Law Times.¹ The general result may be summarised as being that, while a clerk, traveller, or employee or other person coming into touch with confidential sources of information cannot be restrained from afterwards dealing with his employer's customers and making such use of his experience as his abilities and memory enable him to do, he will be restrained from copying or carrying away notes, and from using confidential materials which have come into his hands for the purposes and in the course of his employment. This result is justified upon considerations of the good faith required in such contracts.

SECTION 6.—GOODWILL IN PROFESSIONAL PRACTICES.

1234. Before considering the various occasions which give rise to transfers of goodwill, it is proper to notice one class of business, viz. the practices of professional men, in regard to which it was at one time doubted whether there was any room for goodwill at all. It is obvious that in the case of many professional men the value of their practices depends upon the confidence of their clients in them personally, and that the bare goodwill of their business, apart from personal agreements as to abstention from practice, or as to recommendations by them, could therefore carry little, if anything, to parties acquiring it. In many such instances, therefore, the Courts have held that there was no appreciable goodwill,² and there are dicta in these cases which seem to go the length of denying that a professional man's business can have any goodwill in the strict sense at all.³ Such dicta are, however, it is submitted, to be regarded rather as laying down a proposition in fact than a principle of law.⁴ This view is not inconsistent with the passage in Smith's Mercantile Law on which nearly all such dicta are based. "When the profits of a business result almost entirely from confidence placed in the personal skill of the party employed, as in the case of surgeons or attorneys, the goodwill is too insignificant to be taken notice of."⁵ In *Bain v. Munro*,⁶ a leading Scottish case, there were special circumstances present. The defender, the widow of a doctor, had sold her husband's practice, together with the heritable property in which this had been carried on, which belonged to herself. On the

¹ S.L.T., 1911 (News), pp. 120–122.

² *Austin v. Boyes*, 1858, 2 De G. & J. 626; 27 L.J. Ch. 714, per Chelmsford L.C.; *Smale v. Grieves*, 1850, 3 De G. & Sm. 706; *Arundell v. Bell*, 1885, 52 L.T. 537; *Burns, Aitken & Co. v. Reid*, 1881, 2 Guthrie's Sel. Cases 2; *Corbin v. Stewart*, 1911, 28 T.L.R. 99 (solicitors); *May v. Thomson*, 1882, 20 Ch. D. 705; *Cooper v. Metropolitan Board of Works*, 1884, 25 Ch. D. 472, per Cotton L.J.; *Bain v. Munro*, 1878, 5 R. 416; *Thatcher v. Thatcher*, 1904, 11 S.L.T. 605; *Rodger v. Herbertson*, 1909 S.C. 256 (physicians); *Wilson v. Williams*, 1892, 29 L.R. Ir. 176 (stockbroker).

³ Per Jessel M.R. in *May v. Thomson*, 1882, 20 Ch. D. 705, at p. 718; and per Lord Justice-Clerk Moncreiff in *Bain v. Munro*, 1878, 5 R. at p. 422.

⁴ See per Lord Pres. Dunedin in *Rodger v. Herbertson*, *supra*, at pp. 260, 261, and 265.

⁵ Smith, 9th ed., p. 193.

⁶ *Supra*.

widow being called on by a creditor of her late husband to account for the value of the goodwill of the practice sold, the Court held that no element of the price represented any goodwill which had been *in bonis* of the deceased. It appeared that the doctor had been ill for long before his decease, and that his practice had fallen off; that the purchaser relied mainly on the introductions of the widow and her son; and that he would not have bought the goodwill apart from the house. Lord Gifford (while on these grounds concurring in the judgment of the Court) strongly dissented from the view that there was anything inherently different in a doctor's from any other business as regards the possibility of goodwill; and he indicated that, had there appeared to be anything for which an executor could have got a price in the particular case apart from the house and personal introductions, the widow would have been accountable for it.¹ This is quite consistent with the trend of more recent authorities.²

1235. In many, if not in most, instances of disposal during life, the bare goodwill of a professional practice is valueless apart from a covenant restraining practice; but when death has intervened to prevent competition there seems nothing in principle against even such a practice having a saleable goodwill. It has been held that in such a case goodwill may attach to premises, and it is difficult to see any valid reason why it should not also attach to "connection." It may be suggested that the decision in *Trego v. Hunt*³—involving, as it does, that no one who has not right thereto as a partner or otherwise can avail himself of a business connection attaching to books, records, etc., for the purpose of solicitation of customers—may tend to give an increased value to goodwill in such cases. In the circumstances of *Bain v. Munro*, it does not appear that the widow could now, otherwise than *qua* executrix, well make available to the purchaser, for purposes of introduction, information obtainable only from the books of the deceased. It may frequently be difficult to say in any particular case what is the value of the personal elements and that of the non-personal elements of a goodwill disposed of as a single asset; but "there are undoubtedly cases of professional businesses which are not so dependent on personal qualifications but that some of the goodwill may be transferred without recommendation or introduction."⁴ In *Donald v. Hodgart*⁵ the trustees of a retired Indian engineer who, without having any business premises or staff, had, subsequent to his retiral, made about £300 per annum by procuring and exporting presses to natives and others, apparently for the most part personal acquaintances, were sued for failure to realise the goodwill of this source of income, and were held liable therefor—the value being taken as £300. In the case of *Smale v. Grieves*⁶—a case very similar

¹ 5 R. at p. 424; cf. also note by Mr. Sheriff Guthrie in *Burns, Aitken & Co. v. Reid*, 1881, 2 Guthrie's Select Cases 2.

² E.g. *Thatcher v. Thatcher*, 1904, 11 S.L.T. 605; *Corbin v. Stewart*, 1911, 28 T.L.R. 99. [1896] A.C. 7.

³ 1893, 21 R. 246.

⁴ Allan on Goodwill, p. 46.

⁵ 1850, 3 De G. & Sm. 706.

to *Bain v. Munro*—where the widow and executor of a surgeon-dentist had sold the goodwill of the deceased's business (with an undertaking for her personal exertions in introducing the purchaser) for an annuity of £100 to be paid to her for five years, and the purchaser had taken the stock and premises at a valuation, it was held by Knight Bruce V.-C., on a creditor's suit, that the whole or a part of the annuity belonged to the estate of the testator.¹ The importance attaching to goodwill as an element in a professional man's practice has of late years greatly increased by reason of its bearing on the death duties which may become leviable on the decease of one who has built up a successful business connection of this kind, as the amount of these duties may be affected to an appreciable extent by the conditions under which it is available for sale upon his death. This aspect of the subject is dealt with in a later section.²

SECTION 7.—OCCASIONS FOR DISPOSAL OF OR OTHER DEALINGS IN GOODWILL.

SUBSECTION (1).—*Transfer by Voluntary Sale.*

1236. The various rights and duties arising out of transfer of bare goodwill have already been fully considered, and as it is in the particular case of transfer by voluntary sale that they are all most completely present, any recapitulation is unnecessary. On the occasion of such sales it is, however, often possible and expedient to stipulate for personal covenants restrictive of competition which are not implied in a transfer of bare goodwill. If such are to be included, care must be taken to see that they are in such terms as not to be void as being contrary to public policy. See RESTRAINT OF TRADE. It should be kept in view in framing these that the policy of the law regards such restraints with a more kindly eye when they are imposed in connection with a transfer of goodwill than when they occur in a contract of employment. As has been pointed out,³ in the latter class of case, a restraint on competition *per se* would generally be unenforceable. But it is otherwise when such a restraint occurs as incidental to a sale of goodwill. It will then receive effect provided it is otherwise fair, inasmuch as the absence of competition by the vendor is what gives to the thing sold a material part of its value. The power to sell with the benefit of an enforceable restraint is therefore beneficial to the vendor by enabling him to obtain the best price for what he has to sell.⁴

1237. Express agreement, too, as to the method of use of the old name may save trouble and prevent litigation. Where the goodwill is largely local, it is important to acquire rights to the premises, and in

¹ See also *Corbin v. Stewart*, 1911, 28 T.L.R. 99, and *Morgan v. Schuyler*, 79 New York Reps. 490.

² See para. 1273 *et seq.*, *infra*.

³ Para. 1223, *supra*.

⁴ See *Morris (Herbert), Ltd. v. Saxby*, [1915] 2 Ch. 57; [1916] 1 A.C. 688, per Lord Atkinson at p. 701, Lord Parker at p. 709, and Lord Shaw at p. 714.

such cases the transaction may properly be made conditional on a proper title to these being procurable.¹ Where a name is designative of premises rather than properly social, it will require very clear provision in order that a purchaser of goodwill who does not take the premises may be able to restrain one who subsequently acquires the premises from continuing to use it.² Where goodwill of licensed premises is bought, special care should be taken to make the sale conditional on transfer of the licence being obtained; and if the business is a hotel, restraints on competition should be bargained for.

1238. Unless where heritable property is included, writing, though obviously desirable, does not seem to be essential for a transfer of goodwill. Where, however, a written assignation is taken (in which the technical word "goodwill" should as a matter of expediency be used), it is settled that goodwill is "property" in the sense of the Stamp Acts. As an *ad valorem* stamp is required, even in cases where what is transferred consists entirely of obligations to introduce and restrictive covenants,³ it is not necessary for stamp duty purposes to discriminate as to what portion of the price is attributable to what is strictly goodwill and what to other related elements. The requirement of an *ad valorem* stamp extends even to an assignation *inter socios*.⁴

1239. Where goodwill is sold in conjunction with particular premises, specific implement will be enforced; in other cases it seems to be in each instance a question of circumstances whether the remedy is appropriate.⁵ If the consideration be an annuity by way of share of profits, there is an implied undertaking by the purchaser to carry on the business, and he will be liable in damages if he wrongously fail to do so.⁶ In sale for such a consideration the vendor, on the purchaser's bankruptcy, ranks as a deferred creditor.⁷ It may be observed that, from the standpoint of the purchaser, sales on dissolution of partnership and at death fall to be treated as voluntary sales. Special covenants are, however, often unobtainable in the former, and they are generally unnecessary in the latter, case, unless under circumstances in which the personal representatives are in a position to lessen the value by their competition, or to enhance it by their recommendation. Where this is so it is desirable, if it can be arranged, that appropriate undertakings against competition and for introductions should be stipulated for.

SUBSECTION (2).—*Transfer by Way of Mortgage or in Security.*

1240. Where property has been made the subject of a heritable security, the whole goodwill, so far as local, *i.e.* as identified with the

¹ *Tweed v. Mills*, 1866, L.R. 1 C.P. 39.

² *Cowan v. Miller* (*Sun Foundry* case), 1875, 2 R. 833; cf. *Townsend v. Jarman*, [1900] 2 Ch. 698.

³ *Potter v. Commrs. of Inland Revenue*, 1875, L.R. 10 Ex. 147, per Pollock C.B. at p. 157; *Commrs. of Inland Revenue v. Glasgow and South-Western Rly. Co.*, 1887, 12 App. Cas. 321.

⁴ *Potter, supra*.

⁵ See Allan on Goodwill, pp. 89–91.

⁶ *MacIntyre v. Belcher*, 1864, 32 L.J. C.P. 254; 14 C.B. N.S. 654.

⁷ Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 3.

premises, goes to the mortgagee. In *Pile, ex parte Lambton*¹—where an arbiter, in awarding £11,960 for property, assessed £2800 as compensation for loss of profits—in a competition for this between the mortgagor's executor and the mortgagee the whole sum was given to the latter, as being of the nature of compensation for the value of the business regarded as inhering in the premises.² In England, a mortgage of goodwill, or share and interest in a business, apart from premises, has been recognised;³ and the right to use the firm-name has also been the subject of express mention in a mortgage. The latter is, however, useless unless the mortgagee or his assignee intends to carry on the business.⁴

SUBSECTION (3).—*Transmission owing to Bankruptcy, etc.*

1241. Subject to certain limitations, goodwill is an asset which, on sequestration in bankruptcy, passes to the trustee for behoof of creditors. It was not indeed specially mentioned in the Bankruptcy Act of 1856,⁵ nor is it in that of 1913,⁶ as it is in the English Act of 1883,⁷ and the corresponding consolidating Act of 1914.⁸ But the vesting clauses⁹ are quite wide enough to embrace it.¹⁰ This proposition is, however, subject to two qualifications. (1st) Where the goodwill is entirely local, it goes, with the heritage to which it effeirs, to the person entitled thereto as mortgagee or otherwise, so that the trustee will only get the benefit of it where the heritage goes to him.¹¹ If there is any part forming a marketable asset irrespective of the premises, he may sell this.⁴ (2nd) Where the goodwill is so essentially dependent on personal qualities as not to be transmissible apart from personal covenants and introductions, the trustee cannot utilise it. For whereas the trader can sell rights of restraint the trustee can only sell property; and a trader is not deprived by a judicial sale of his right of free competition, even among former customers.¹² Where, however, a bankrupt, on an erroneous view of his obligation, has concurred in selling goodwill with personal stipulations, the Courts have shewn an indisposition to disturb the transaction.¹³ And a trustee may be able to obtain the benefit of a sale which he could not himself enforce. Where, *e.g.*, anterior to sequestration, a bankrupt attorney had sold personal goodwill with restrictive covenants in return

¹ 1876, 3 Ch. D. 36.

² Cf. *Austin v. Boyes*, 1858, 2 De G. & J. 626; 27 L.J. Ch. 714; and *Selkirk (Coupland's Tr.) v. Coupland*, 1886, 23 S.L.R. 456, a case of bankruptcy.

³ Allan, p. 77.

⁴ *Beazley v. Soares*, 1882, 22 Ch. D. 660.

⁵ 19 & 20 Vict. c. 79.

⁶ 3 & 4 Geo. V. c. 20.

⁷ 46 & 47 Vict. c. 52, s. 56.

⁸ 4 & 5 Geo. V. c. 59, ss. 46, 55, 56.

⁹ Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), ss. 102 and 103, and Bankruptcy Act, 1913, s. 97.

¹⁰ *Melrose-Drover, Ltd. v. Heddle*, 1902, 4 F. 1120.

¹¹ *Bain v. Munro*, 1878, 5 R. 416; *Selkirk (Coupland's Tr.) v. Coupland*, *supra* (licensed premises); and other cases cited *supra*, para. 1239, and *infra*, para. 1252.

¹² *Green & Sons (Northampton), Ltd. v. Smiths*, [1914] 1 Ch. 562; *Farey v. Cooper*, [1927] 2 K.B. 384; see *Ginesi v. Cooper & Co.*, 1880, 14 Ch. D. 596.

¹³ *The Buxton, etc. Publishing Co. v. Mitchell*, 1884, 1 C. & E. 527; *Clarkson v. Edge*, 1864, 33 L.J. Ch. 443.

for an annuity, the trustee was held entitled to attach the annuity.¹ The trustee may resell the business to the bankrupt.²

1242. Consistently with the principles so applied in the case of administration in bankruptcy by the receiver or statutory trustee, it was held in *Green & Sons (Northampton), Ltd. v. Smiths*³ that, where a sale had been carried through by a trustee acting under a deed of assignment in bankruptcy granted by an insolvent, the granter of the assignment was not restrained from competing among his former customers, with the purchasers from the trustee, even although the insolvent had bound himself to aid the trustee in the realisation of his estate. This stipulation was treated as merely giving expression to the obligation which is incumbent on every debtor under the Bankruptcy Acts; and the principle established in the case of a direct transfer under the Acts in *Ginesi v. Cooper & Co.*⁴ was held applicable to the granting of an assignment in trust by an insolvent person. In such circumstances an assignment for creditors, though in form voluntary, must for this purpose be regarded as really granted under compulsion.⁵

SUBSECTION (4).—*Transfer on Dissolution of Partnership.*

1243. Goodwill, so far as marketable, falls, on the dissolution of a copartnery, to be treated as an asset of the firm, and to be realised along with the rest of the partnership property for behoof of all the partners.⁶ In a division of the company property, any partner is, in the absence of agreement, entitled to have it brought to public sale, and is not bound to fix a value at which he will either part with his own share or acquire that of the others.⁷ In *Stewart's* case this rule was applied even although several years had elapsed since dissolution. Where, however, the firm was insolvent at the time of dissolution, nothing was held to be payable for goodwill by a partner who, continuing to carry on the business, had converted it again into a paying concern.⁸ But sale can only be enforced (in the absence of special provision to the contrary) on the footing that the other partners may carry on a similar business in competition,⁹ and notice has been ordered to be given of this incident.¹⁰

1244. Where there is a marketable personal element in the goodwill of a business which is in the main local, a partner who, through ownership of the premises, has obtained the advantage of this on dissolution

¹ *Neale v. Day*, 1859, 28 L.J. Ch. 45.

² *Ritson v. Hardwick*, 1872, L.R. 7 C.P. 473.

³ [1914] 1 Ch. 562.

⁴ 1880, 14 Ch. D. 596.

⁵ *Farey v. Cooper*, [1927] 2 K.B. 384; and see paras. 1230 and 1231, *supra*.

⁶ See Lindley on Partnership, 6th ed., p. 445; Clarke on Partnership, p. 436; *In re David & Matthews*, [1899] 1 Ch. 378; Partnership Act, 1890, s. 39, and Pollock on Partnership, 7th ed., p. 110; *M'Cormick & Carnie v. Wilson's Exrs.*, 1822, 1 S. 541.

⁷ *Marshall v. Marshall*, 23rd February 1816, F.C.; *Stewart v. Stewart*, 1835, 14 S. 824.

⁸ *Broughton v. Broughton*, 1875, 44 L.J. Ch. 526.

⁹ *Cook v. Collingridge*, 1860, 27 Beav. 456.

¹⁰ *Johnson v. Halleley*, 1865, 34 Beav. 63; *Hall v. Burrows*, 1864, 33 L.J. Ch. 204; see, too, *In re David & Matthews*, *supra*, for an examination of the authorities on this.

has been held liable to recompense his partners therefor.¹ Where the local element attaches to premises held on lease, and a partner has surreptitiously obtained renewal of the lease in his own name, the others are, on ordinary principles of partnership law, entitled to have the lease realised as truly partnership property.² So if a partner have otherwise obtained the benefit of goodwill, he must, in general, account therefor,³ and, pending settlement, the Courts will protect it.⁴ But sale may be waived; and if waived, each partner will have an equal right to share in goodwill, just as in the other assets.⁵

1245. Similar principles apply to the case of dissolution by the death of a partner as to dissolution by agreement or efflux of time. The view that on death goodwill "survived," apart from agreement, to the other partners—a view not countenanced by what Scottish cases there are⁶—is now discredited even in England. Although a surviving partner may indeed by force of circumstances obtain the benefit of goodwill without payment by reason of its being unsaleable if he is to be free to compete,⁷ still, wherever the goodwill has a saleable value the survivor cannot sell or appropriate it for his own behoof, but it must be dealt with for joint benefit of the survivors and representatives of the predeceaser.⁸ For examples of "survivorship" by agreement see *Hordern v. Hordern*⁹ and *Boorne v. Wicker*.¹⁰ In the latter case it was held that where the contract of copartnership provides for the share of a deceasing partner in the capital and assets of the concern passing to the surviving partners, the executor of the predeceasing partner should be restrained from canvassing the customers of the firm—the principle of *Trego v. Hunt*¹¹ being held to apply. Where a surviving partner or an employee of a firm has been appointed executor to a predeceasing partner there is, however, no equity which debars him as an individual from exercising his right (in the absence of special agreement) to continue to carry on the same line of business, even although his doing so may render the goodwill valueless.¹²

1246. In the case of bankruptcy of the firm, the goodwill is dealt with as already explained. Bankruptcy of an individual partner is just a special case of dissolution, the trustee being entitled to his interest.

1247. These observations apply, unless otherwise mentioned, only to cases where there is no provision in the deed of copartnership as to the

¹ *Mellersh v. Keen*, 1860, 28 Beav. 453; *Pawsey v. Armstrong*, 1881, 18 Ch. D. 698; *Walker v. Hirsch*, 1884, 27 Ch. D. 460.

² *Featherstonehaugh v. Fenwick*, 1817, 17 Ves. 298; *M'Whannell v. Dobbie*, 1830, 8 S. 914; see also *Aitken's Trs. v. Shanks*, 1830, 8 S. 753, where dissolution occurred during natural course of lease.

³ *Stewart v. Stewart*, 1835, 14 S. 824.

⁴ *Turner v. Major*, 1862, 3 Giff. 442.

⁵ *Lindley on Partnership*, p. 439; *Banks v. Gibson*, 1865, 34 Beav. 566.

⁶ See, e.g., *Aitken's Trs. v. Shanks*, *supra*.

⁷ See, e.g., *Davies v. Hodgson*, 1858, 28 Beav. 177.

⁸ Cp. *Lindley on Partnership*, 6th ed., p. 445, and *Allan on Goodwill*, pp. 63–66.

⁹ [1910] A.C. 465.

¹⁰ [1927] 1 Ch. 667.

¹¹ [1896] A.C. 7.

¹² *Davies v. Hodgson*, 1858, 28 Beav. 177.

disposal of goodwill on dissolution. Where there are such provisions, they of course receive effect. It is well to use the word "goodwill," as there are contradictory decisions as to whether it is embraced in such general words as "stock," "estate and effects," etc.¹ A purchaser of "assets" without any restrictive term (or a partner who is entitled to retain "assets" on dissolution) is entitled to the goodwill with its incidental rights.²

1248. Even where a partner would in ordinary course obtain the whole benefit without payment on the predecease of his copartner, he may competently be bound in the contract to make a payment, by way of annuity or otherwise, therefor, such obligation not being held to be one without consideration.³ Under an agreement whereby a surviving partner was to pay, for six months from the predeceaser's death, the share of profits to which the latter would have been entitled to the latter's executor "for behoof of his widow, child, or children," it was held that the payment did not fall into the deceased's executry, but fell to be divided equally between the widow and an only child.⁴ Under a contract by which a retiring partner (solicitor), who was not placed under restraints on practising, was entitled to a payment for goodwill based on a multiple of average profits, it was held by Chelmsford L.C., that on a dissolution shortly before the stipulated term of expiry, the amount due was limited to the proportion for the short period to the date of expiry.⁵

1249. The benefit of a stipulation binding a partner not to carry on a business competing with that of his firm will, on his retiral and a subsequent sale of the business and its goodwill, probably generally pass to the purchaser.⁶ But this is not necessarily so, especially in the case of transfers of professional practices, where the goodwill varies with the personality of those conducting the business for the time, so that the thing to which the covenant is attached may not be identical with what is sold at a later date. This subject was very fully considered in the case of *Rodger v. Herbertson*⁷—dealing with a doctor's practice—in which a restraint on competition was held to be conceived in favour of the original transferee personally, and not to be available to a subsequent purchaser of the practice. Unless there is an express assignation of a right to use the name of the firm, the implied right to do so is qualified by the restriction that it must not be so used as to expose the former partner to risk of liability on the plea of "holding out."⁶ The use of a surname which is that of the retired partner with the addition of the

¹ Lindley on Partnership, p. 449, and cases cited there; *In re David & Matthews*, [1899] 1 Ch. 378; *Edinburgh Street Tramways Co. v. Lord Provost, etc. of Edinburgh*, [1894] A.C. 471; and *Hamilton Gas Co. v. Mayor, etc. of Hamilton*, [1910] A.C. 300.

² Pollock on Partnership, p. 111; *Jennings v. Jennings*, [1898] 1 Ch. 378.

³ *Featherstonehaugh v. Turner*, 1857, 25 Beav. 382.

⁴ *Adamson's Trs. v. Adamson's Exrs. and Ors.*, 1891, 18 R. 1133.

⁵ *Anton v. Boyes*, 1853, 2 De G. & J. 626; 27 L.J. Ch. 714.

⁶ *Townsend v. Jarman*, [1900] 2 Ch. 693.

⁷ 1909 S.C. 256; see especially per Lord Pres. Dunedin at p. 260.

words “& Company” was held not to be objectionable, at least where the late partner had not carried on business himself under that style. And in the same case, the name of the retired partner having been carved on the freehold premises which were acquired by the successors, it was held that the latter (who did not trade under it) could not be compelled to remove it.¹

1250. Where a partnership is dissolved by the expulsion of a partner under provisions in the contract of copartnery, then while he may not represent himself as continuing to carry on the business of the firm from which he has been expelled, there is nothing (in the absence of special provision) to prevent him from carrying on business of the same kind on his own account, and he cannot be restrained from soliciting customers of his former firm.²

1251. Arising out of payments in respect of goodwill on dissolution by death or otherwise questions may emerge relating to deductions in estimating profits for income tax purposes, and to estate duty, etc. These are considered below.³

SUBSECTION (5).—*Transmission in Succession, on Death.*

1252. It follows from the recognition of goodwill as property that, where it is capable of existence at all independently of the trader, it may continue to exist after his death, and may pass to his representatives. It is indeed in this connection that goodwill first appears as a legal entity, a case regarding it being reported so far back as 1744.⁴ And questions have frequently arisen as to what representatives were to get the benefit of it, *i.e.* whether it should be treated as heritable or moveable estate. Each case appears to have been decided largely on its own merits, without the formulation of any general rule. The following propositions seem, however, to be deducible from the decisions: (a) Where any goodwill is purely personal and not transmissible apart from introductions, it cannot be regarded as at all *in bonis* of the deceased, and anyone in a position to give the introductions may retain any price obtainable therefor.⁵ (b) Probably only the deceased's personal representatives may use his books and other private sources of information as to his connection for the purpose of canvassing his customers;⁶ and any price to be had therefor would go to his executors.⁷ (c) Where entirely attached to the heritable property in which the business is carried on, it will be heritable and go to the heir or other party entitled to the heritage.⁵ But it seems to be in each case a question of fact, depending on circumstances, whether and to what extent the goodwill

¹ *Townsend v. Jarman*, [1900] 2 Ch. 693.

² *Dawson v. Benson*, 1882, 22 Ch. D. 504, per Jessel M.R. and Cotton L.J.

³ See para. 1273 *et seq.*, *infra*.

⁴ See Allan on Goodwill, p. 56.

⁵ *Bain v. Munro*, 1878, 5 R. 416.

⁶ *Trego v. Hunt*, [1896] A.C. 7.

⁷ *Robertson v. Quiddington*, 1860, 28 Beav. 529; *Smale v. Grieves*, 1850, 3 De G. & Sm. 706; and dicta in *Bain v. Munro*, *supra*.

does so attach.¹ (d) Even where essentially local, if the premises do not go to the heir there may be a marketable element in goodwill "considered as an introduction to the landlord," and this will fall into executry.² But obviously this cannot apply where the trader owns the premises, and the heir succeeds to them and so himself becomes landlord;³ nor can it apply where the executor has been a competitor with the new tenant for a renewal.⁴ (e) Where goodwill is separable from premises, it is moveable, and goes to executry.⁵ (f) Even where it is mixed, the executors may get the benefit of the moveable element merely indirectly, and in some form other than a payment from the heir, through the whole subjects being exposed as a going concern and the goodwill and right to use the name being included, by implication, in the sale.⁶ Thus a pottery having been sold as a going business for a large sum, of which a part was for plant, and the purchaser being obliged to take over the stock-in-trade at a high figure, it was held that, apart from the enhanced price which the subjects, heritable and moveable together, brought as a going business, there was no separate value attributable to goodwill.⁶

1253. Goodwill may be the subject of bequest, and in bequeathing it it is important to see that the wording is such as to pass what is intended to be conveyed, as otherwise, if the goodwill be mainly local, the views of the testator may be stultified by the heritage going off to the heir.⁷ The possible value of goodwill is legitimate matter for consideration by trustees in estimating the reasonable amount of a payment to compromise a claim for legitim.⁸

1254. An executor, being liable to account both to creditors of the deceased and to his general representatives for the estate of the deceased, is of course bound to include in this accounting the value of any realisable goodwill of a business carried on by the party whose executor he is, which may have been *in bonis* of the deceased. But he is not, merely *qua* executor, a trustee for creditors so as to be accountable for profits obtained by carrying on the business after the death of the former owner. The measure of accountability is the value of the asset as at the time of death, not the profits made by its use, or an enhanced value which it may have acquired as a result of the trading after death.⁹

¹ See *Leishman v. Glen & Henderson*, 1899, 6 S.L.T. 328; *Town and County Bank v. Murdoch's Factor*, 1902, 9 S.L.T. 485; *Graham v. Graham's Trs.*, 1904, 6 F. 1015; *Murray's Tr. v. M'Intyre*, 1904, 6 F. 588; *Ross's Trs. v. Ross*, 1901, 9 S.L.T. 286; *Honour and Ors. v. Muirhead's Trs.*, 1905, 7 F. 496; *Cousin v. Edinburgh Assessor*, 1928 S.C. 392; and *Edinburgh Assessor v. Caird & Crolla*, 1928 S.C. 398.

² *Brown v. Robertson*, 1896, 34 S.L.R. 570.

³ *Kelly v. Montague*, 1892, 29 L.R. Ir. 429, C.A.

⁴ *Philp's Exr. v. Philp's Exr.*, 1894, 21 R. 482.

⁵ See dicta in *Bain v. Munro*, 1878, 5 R. 416; *Brown v. Robertson*, *supra*; and *Donald v. Hodgart's Trs.*, 1893, 21 R. 246.

⁶ *Bell's Trs. v. Bell*, 1884, 12 R. 85.

⁷ *In re Henton*; *Henton v. Henton*, 1802, 30 W.R. 702; *Robertson v. Quiddington*, 1860, 28 Beav. 529.

⁸ *Eaton v. Buchanan*, 1911 S.C. (H.L.); [1911] A.C. 253, at pp. 259 and 273.

⁹ *Brown v. Robertson*, 1896, 33 S.L.R. 70; *Stewart's Tr. v. Stewart's Exr.*, 1896, 23 R. 739; *Morrison's Tr. v. Morrison*, 1915, 2 S.L.T. 296; *Broughton v. Broughton*, 1875, 44 L.J. Ch. 526.

In applying this principle, a spouse or child claiming legal rights falls to be treated as a creditor, the rights of such being measured as at the date of death. It may perhaps be more easy to imply a fiduciary duty in case of postponed realisation by one who is not merely an executor but a trustee for persons having beneficial interests under the settlement. But even in this case it would seem to be a question of fact whether the executor-trustee has actually intromitted with anything which was truly an asset of the deceased's estate. For example, a trustee having an independent right to a lease of the premises in which a business was carried on might very well be held to continue and enjoy the business in virtue of that right to the premises rather than in respect of the right vested in him as successor and executor. And as the cases already cited shew, it may very well be that in some instances the fact of death extinguishes any potentially valuable transmissible element of the nature of goodwill in certain classes of businesses.¹

1255. Where under contract of copartnery surviving partners have right to a business, the executor of a deceasing partner is debarred from competing for the customers of the business:² and the same would probably be held to apply to an executor selling the goodwill of a business forming part of the estate under his administration; although as an individual he may be entitled to compete in circumstances in which his so doing will render the business valueless to the estate.¹

1256. An executor who had sold the goodwill of a deceased trader's business, but had retained the stock and gradually sold it off, was held to be a person "carrying on the business" within the meaning of the Finance Act, 1918,³ and therefore liable in payment of excess profits duty.⁴

1257. In exceptional circumstances a payment in respect of goodwill may fall to be received by an executor as administrator which does not fall to be distributed by him as part of the executry estate. Thus, in *Adamson's Trs. v. Adamson's Exrs.*,⁵ a contract of copartnership provided that if either of two partners should die during the continuance of the partnership "leaving a widow, child, or children surviving," the surviving partner should for a period of six months after the deceased partner's death pay to the latter's executors "for the benefit of his widow, child, or children the share of profits to which the said deceased partner would have been entitled had he lived." On the death of one partner leaving a widow and child it was held that this share of profits, though payable to the executors, did not form part of the executry estate but fell to be equally divided between the widow and child.

¹ See, e.g., *Davies v. Hodgson*, 1858, 28 Beav. 177.

² *Boorne v. Wicker*, [1927] 1 Ch. 667.

³ 8 & 9 Geo. V. c. 15, s. 35 (2) (a).

⁴ *Guest's Exr. v. Inland Revenue Commrs.*, 1921 S.C. 440, per Lord Pres. Clyde at p. 445.

⁵ 1891, 18 R. 1134.

SUBSECTION (6).—*Compensation for Goodwill on Compulsory Purchase.*

1258. Where the compulsory taking of lands is authorised under Acts incorporating the Lands Clauses Consolidation Act, 1845, or the Railways Clauses Consolidation Act, 1845, goodwill is, to a certain extent, an element to be regarded in awarding compensation; and even where these Acts are not incorporated in private Acts, the latter generally contain similar provisions. In a question with a mortgagee or non-occupying owner, it is only strictly local goodwill which can be allowed for. In the case of a claim by a lessee, tenant, or occupying owner the criterion is rather what he would give to be allowed to continue business in the same premises, than what he could get from another for his interest. "The amount of damages is not the absolute amount of loss which you would sustain if, the moment you got notice to quit, you instantly gave up your business; but it is the amount of damage you will sustain measured by this, that you have done what was reasonable and proper, by endeavouring to get another place; and if you cannot get another place, or if the place is at all inferior, you are entitled to damages for the difference."¹ Where, as is frequently the case, compensation for goodwill is assessed on the basis of so many years' purchase of profits,² the gross drawings must of course be reduced by deducting wages—including, it may be, where the claimant is himself actively engaged, a sum in name of "wages of superintendence" earned by him, unless he is rendered unable to use his personal business aptitude to equal purpose elsewhere on being extruded.³ Where the lands are not themselves taken, but are injuriously affected, it rather seems that mere goodwill is not in itself an "interest in land" damage to which gives right to compensation.⁴ Where, however, there is physical interference with the land, or with some right incident thereto, such as right of access, this entitles to compensation, and proof of damage to goodwill might possibly be relevant. The cases, however, are too numerous and involved to admit of advantageous condensation here; reference may be made to *Deas on Railways*.⁵ In the case of injury by severance, compensation seems to be more freely allowed than where no land is taken.⁶

1259. In determining the amount of compensation under the Housing of the Working Classes Act, 1890,⁷ an arbiter may not competently take into account any loss of trade or diminution in the value of goodwill suffered by the claimants.⁸

¹ Per Sheriff Allison in *Ramsey v. City Union Rly. Co.*, 24th March 1866, cited in *Deas on Railways*, 2nd ed., p. 300; cp. also *Bidder v. North Staffordshire Rly. Co.*, 1877, 4 Q.B.D. 432, per Lord Bramwell; *Commrs. of Inland Revenue v. Glasgow and South-Western Rly. Co.*, 1887, 12 App. Cas. 321, per Herschell L.C.

² See para. 1261, *infra*.

³ Cf. as to appropriate deduction *Strain's Trs. v. Strain*, 1893, 20 R. 1025, at p. 1028.

⁴ *Ricket v. Metropolitan Rly. Co.*, 1867, L.R. 2 H.L. 175.

⁵ 2nd ed., pt. iv. chap. ii. p. 302 *et seq.*

⁶ Allan on Goodwill, chap. vi.

⁷ 53 & 54 Vict. c. 70.

⁸ *Re Harvey & London County Council*, [1909] 1 Ch. 528.

SECTION 8.—VALUATION OF GOODWILL.

1260. The valuation of the goodwill of a business is a matter as to which no general rule can be laid down. Obviously value will vary with the nature of the business and with the circumstances under which it has to be valued. Thus, for example, the value of a professional practice, measured in terms of drawings or of profits, will generally greatly differ from that of a business with an established mercantile connection, as will the latter from that of a business identified with and practically inseparable from the possession of the premises in which it is conducted. So too the value of the same business will vary according as the occasion for the valuation of goodwill is the death of the former proprietor of it, or his retiral with or without the promise of introduction to the purchaser, or with or without restrictive covenants; or, again, as the occasion may be the acquisition of a part share in a business or practice to be carried on with the continuing co-operation of the vendor and all the advantage that his continued presence will secure. The variation in these elements makes it impossible usefully to lay down any general guide. By reference to the cases noticed in connection with the various occasions of transfer indications will be found of the sums paid in particular instances.¹

1261. Two observations may, however, be made which are of general application. First, that the method of estimating the value of goodwill generally adopted is in terms of some multiple of the profits. In some cases, *e.g.* usually in sales of medical practices, at least in England,² the drawings or gross profits are taken as the basis. But nett profits is the more usual basis. For the deductions to be made from drawings to ascertain these, reference may be made to the observations in the cases undernoted.³ The appropriate multiple to be applied will be governed by the circumstances of each particular case, having regard to the considerations adverted to above. A second observation of general application is that the tendency is for the value of goodwill to increase in recent years with the greater opportunity for securing wide notoriety for a business by advertisement. In many cases the goodwill represents the fruits of a high degree of expenditure of money and judgment in advertising, which is and ought to be reflected in the price obtainable. As will appear in dealing with goodwill in relation to taxation, the importance of accurate valuation and careful distinction of the elements entering into this has of recent years become very much enhanced by reason of the increasing rates and duties on the occasions of transfer on death, etc.⁴

¹ *E.g.* *Bishop v. Nicol's Trs.*, 1921 S.C. 229 (four years); *Mellersh v. Keen*, 1860, 28 Beav. 453 (one year); *Llewellyn v. Rutherford*, 1875, L.R. 10 C.P. 456; *Rutherford v. Inland Revenue Commrs.*, 1926 S.C. 689 (diminishing proportion of average profits over five years).

² See "The Conduct of Medical Practice," published by The Lancet, 1927, p. 56.

³ *Strain's Trs. v. Strain*, 1893, 20 R. 1025, per Lord Justice-Clerk Macdonald at p. 1028; *Bishop v. Nicol's Trs.*, 1921 S.C. 229, per Lord Justice-Clerk Scott Dickson.

⁴ See para. 1273 *et seq.*, *infra*.

1262. An element of value which is analogous to but yet distinct from that of goodwill may arise where subjects suited to a business are to be taken over by the purchaser of the goodwill at a valuation. In such circumstances it may be quite appropriate that the valuer should value these subjects as part of a going concern, thereby placing on them a higher value than they would have at a break-up sale. Thus, where a valuer had so valued the furniture and other moveables in an hotel, where the business had been bought along with the goodwill of it, an objection to the propriety of his valuation on the ground that it was on an improper basis, as goodwill had already been paid, was repelled. It was held that, while the valuator would not have been justified in allowing any element of goodwill to affect the valuation, he was nevertheless entitled, in valuing the furniture and moveables, to have regard to the fact that they were parts of a going concern, inasmuch as articles specially collected and assembled for a particular purpose possess, apart altogether from any consideration of goodwill, a value greater than the sum of the market values of the separate articles. This special value represented approximately an allowance for the trouble and cost which would have been incurred in going into the market to replace the articles and in assembling them together.¹

1263. Where a value has been placed upon goodwill by a company in its balance sheet which experience has shewn to be unduly low, and depreciation has been written off accordingly to a greater extent than experience shews to be required by the actual facts, the company may, if not prohibited by its constitution, competently write back to profit and loss account and treat as available for dividends so much of the depreciation written off upon goodwill in past years as is proved to have been in excess of the proper requirements, having regard to the value of goodwill as ascertained by experience.²

SECTION 9.—REDRRESS FOR NON-IMPLEMENT OF CONTRACTS DISPOSING OF GOODWILL.

1264. The occasion for seeking redress may on the one hand be due to a simple breach of contract, *i.e.* to failure on the part of a seller to transfer the goodwill or some essential part thereof (*e.g.* business books), or to refrain from unlawful competition, or on the part of the buyer to pay the stipulated price; or it may on the other hand arise from the fact that, while the thing purchased has *prima facie* been handed over, it has been found to be so different in value or quality as to be something essentially other than it was represented by the seller (innocently or otherwise) to be.

1265. The former type of case presents little difficulty. The buyer may in general require implement or claim damages. Specific performance is readily decerned for where the transaction is bound up with a sale of heritage, and also—by way of interdict—against dealings incon-

¹ *Macdonald v. Clark* (O.H.), 1927, S.N. 6.

² *Stapley v. Read Bros.*, [1924] 2 Ch. 1.

sistent with the good faith of the sale. Where goodwill has been sold apart from heritage, the granting of specific implement is in Scotland a question for the Court, having regard to the circumstances, as in other contracts.¹ To a seller the remedy open is, normally, a simple action for the price; but where the consideration for the transfer is one dependent on the continued carrying on of the business, the buyer may be required to carry out the contract or to pay damages.² In such cases of proper breach, it is generally competent for a buyer or transferee, under the general principles of the law governing mutuality of obligations in Scotland, to plead any failure to implement the contract in answer to an action for the price.³ In this connection the case of *M'Kirdy v. Paterson*⁴ is important from the standpoint of process. There the pursuer had retired from business under an agreement whereby he was to receive as compensation from his two partners £2500 over and above his share of capital and profits. He duly retired, and after some time brought action against Paterson, the only one of the partners who then continued the business, for payment of the £2500. This Paterson resisted, on the ground that M'Kirdy had set up a new firm carrying on the same business, and had solicited and withdrawn customers, thus (it was contended) committing such a breach of the agreement as inferred forfeiture. Some difference of view prevailed among the judges whether the acts complained of were, if proved, contrary to the agreement. Lord Benholme looked on the price as being for "the value of the future profits to be derived from the existing constituents and customers of the firm," and expressed an opinion that the pursuer was not entitled to divert to himself those very customers whose employment was to be the source of those profits. In the Inner House opinions on this point were reserved, but the judges concurred with the Lord Ordinary in holding that, the pursuer having *prima facie* put his partners in possession of what he had sold them, any such infringement by the pursuer of the terms of the contract as that alleged could not competently be put forward in defence to the claim for the price, as inferring a forfeiture thereof—although, if the breach were clear, it might be founded on, even in defence, by way of damages. It was further questioned whether Paterson, who was one of two who had remained in the firm when the pursuer retired, and had since separated from the other, and dropped the firm style, had any title to plead the forfeiture, the sale having been to the firm.

1266. In the other type of case—where the complaint is that although the contract has been implemented ostensibly by the transfer of the goodwill of the business bargained for, this has turned out to be so inferior in value or quality to what it was (innocently or otherwise) represented to be that it is in fact something materially different from what the buyer understood that he was getting—the normal process of

¹ *Stair*, i. 17. 16; *Bell's Prin.*, s. 29; *Stewart v. Kennedy*, 1890, 17 R. (H.L.) at pp. 9 and 11.

² *MacIntyre v. Belcher*, 1863, 32 L.J. C.P. 254.

³ See *Turnbull v. Maclean*, 1874, 1 R. 730.

⁴ 1854, 16 D. 1013.

redress is reduction on the ground of error, either essential or material, and induced by the seller. If the transaction has taken the form of the purchase of heritable property which is the seat of a business and of the goodwill of the business as parts of a single deal, it has been held that it may be treated as indivisible, and reduction be competent even in the absence of any averment of misrepresentation affecting the heritable subject and although there has been apportionment of the consideration and delivery of title to the heritable subjects sold.¹

1267. It may, however, be that the discrepancy has only been discovered after such a lapse of time that circumstances have materially altered, so that the buyer cannot or does not desire to annul the contract and restore things *in integrum* (as, for example, where he has himself gone on to spend money on the development of the business acquired). In such circumstances is it open to him to claim damages *quantum minoris*, either by direct action or by way of counterclaim in an action for the price? A sale of goodwill is not a "sale of goods" so as to fall within the scope of s. 11 (2) of the Sale of Goods Act, 1893.² And it has been held in the Outer House that the remedy of damages without rescission is not available under Scots common law (apart from fraud) in the case of sale of goodwill where heritable subjects are not involved.³ This judgment was pronounced by Lord Anderson under constraint of what he regarded as the weight of authority.

1268. It may be suggested that, where the deficiency in value has been discovered only after it is too late to restore things to their original condition, other considerations might prevail.⁴ In the type of case of which *Straker & Sons v. Campbell*¹ is an example, where heritage is an indivisible element in the transaction, a claim *quantum minoris* would seem to be admissible.⁵ And where fraudulent misrepresentation is averred compensation for the inferiority may be recovered under the guise of damages for the fraud.³ Such a claim may be relevant even although it is not averred that the purchaser has been unable to make a profit from the conduct of the business; that he has done so is not inconsistent with the possibility that the goodwill bought was valueless.³ But it seems that such a claim where founded on delict cannot properly be maintained as a defence to an action for payment of the price or as a counterclaim therein; it must be constituted by substantive action.⁶

SECTION 10.—GOODWILL IN RELATION TO RATING.

1269. By reason on the one hand of the increase in businesses with large and stable connections built up often by substantial expenditure not merely of personal energy but of money, and on the other hand

¹ *Straker & Sons v. Campbell*, 1926, S.L.T. 262.

² 56 & 57 Vict. c. 71.

³ *Bryson & Co. v. Bryson*, 1916, 1 S.L.T. 361.

⁴ See cases cited in Gloag on Contract, p. 708.

⁵ Cf. *Loultit's Trs. v. Highland Rly. Co.*, 1892, 19 R. 191, per Lord MacLaren, cited by Lord Anderson in *Bryson & Co. v. Bryson*, *supra*.

⁶ *Smart v. Wilkinson*, 1928 S.C. 383; see Glegg on Reparation, 2nd ed., p. 281 *et seq.*

of the constantly increasing burden of taxation, local and national, questions regarding the existence and value of goodwill as an asset have become more and more important in recent years and have given rise to many questions between the revenue authorities and the taxpayer. In their bearing upon local rating, these questions have generally arisen in connection with the valuation of lands, and have turned upon the heritable or moveable character of any goodwill that may exist. In relation to taxation, on the other hand, this element is less important, the questions arising being concerned rather with the existence and value than with the particular character of goodwill.

1270. In Scotland a payment made by a tenant to his landlord in respect of goodwill is usually treated as "a consideration other than the rent," which falls to be taken into account in assessing the value of the subjects for entry on the roll.¹ The general rule was thus expressed by Lord Fraser: "It has been decided that where a sum of money is paid to the landlord which is said to be for goodwill, this is to be taken, in the general case, as simply a payment in advance of rent. At all events it is a consideration other than the rent which the parties insert in the lease. I have had occasion repeatedly to point out the distinction between the payment of a sum of money in name of goodwill to the landlord on the occasion of a lease, and a payment made by an incoming tenant to an outgoing tenant during the currency of a lease. In the former case the payment for goodwill is taken into account in entering the value in the Valuation Roll, in the latter case it is not."² The effect to be given to such a payment is dependent on the circumstances of each case as indicating the extent to which it is made in respect of something pertaining to the heritage. Thus, in *M'Farlane & Dailly v. Dundee Assessor*,³ where a payment of £510 was made to the representatives of a deceased landlord by one who took a lease of the premises at a rent of £80, this rent was accepted, as no part of the £510 was shewn to have gone to the heir. While a sum payable to the landlord falls to be taken into account as a consideration other than the rent, it by no means follows that the quotient of the whole sum, divided by the number of years, falls to be added to the nominal rent. It is a question of circumstances in each case whether part of the sum is not paid in consideration of other than local elements of goodwill.⁴ In the case last cited an obligation by the landlord not to compete with his tenant was instanced with approval as a fitting counterpart for a portion of such a payment. Where the agreement contains no material for apportioning

¹ *Lanarkshire Assessor v. Selkirk*, 1887, 14 R. 579; *Kilmarnock Assessor v. M'Nally*, 1887, 14 R. 582 (public-houses); *Wilson v. Renfrewshire Lower Ward Assessor*, 1884, 21 S.L.R. 545; *Drummond v. Leith Assessor*, 1886, 13 R. 540, and cases there cited; *Glasgow Iron Co. v. Assessor*, 1873, 11 M. 989 (ironworks); *Hughes v. Stirling Assessor*, 1892, 19 R. 840; *Ormiston v. Greenock Assessor*, 1906, 8 F. 497; *Mark v. Edinburgh Assessor*, and *Scott v. Edinburgh Assessor*, 1911 S.C. 974, in which the authorities are considered.

² *Lanarkshire Assessor v. Selkirk*, *supra*, at p. 580.

³ 1891, 18 R. 939.

⁴ *Wilson v. Renfrewshire Lower Ward Assessor*, *supra*; *Lanarkshire Assessor v. Selkirk*, *supra*, especially per Lord Fraser at p. 581.

a sum paid for goodwill between the premises and the personal interest, the valuation must be made on the general principle of estimating what the subjects would fetch if let year by year.¹

1271. The principle of "consideration other than the rent" is not directly applicable except in cases in which the payment for goodwill passes between landlord and tenant. Thus where, by an arrangement between one of two joint tenants and a transferee from the representatives of the other who had carried on a public-house business in part of the premises and who had died, the transferee got a lease of the shop for a subrent higher than the original rent, paying also a sum for fittings and goodwill to the representatives, it was held that the transaction was one between tenant and tenant, and that the enhanced rent was all that fell to be entered as the annual value.² In valuations of shop or business premises which are not let, the primary standard is the fair rent as gathered from what is paid for similar premises in the neighbourhood which are actually let.³ But this may be tested by a consideration of price paid for the particular premises on a recent sale, including any payment for goodwill. It is again a question of fact in each case to what extent such a payment is made in respect of elements which are personal, as distinct from those which attach to the premises.

1272. In the case of public-houses, it is generally assumed that the payment is preponderatingly for heritable elements, especially in the crowded part of a large town; and in regard to public-houses in general an impression seems to have become prevalent that the appropriate principle of valuation in such cases was to ascertain what part of the price effeired to goodwill, and then to treat one-half of that as applicable to heritable elements.⁴ The propriety of this course was repudiated by the Court in *Cousin's* case,⁴ and the rule laid down that the yearly rent or value of licensed premises recently sold, and in the occupation of the proprietor, is not necessarily represented by taking a proportion of the price ascribed to the heritable subjects and adding thereto a percentage on half the sum ascribed to goodwill. While such a method may afford a useful guide to the valuation it is not conclusive, and the assessor is bound to consider the whole circumstances, including, *inter alia*, the yearly rents or values of similar licensed premises in the neighbourhood. Although it is in respect of transactions in the goodwill of licensed premises that the heritable element in goodwill bulks most largely, its importance is not confined to them; and its possible presence is a matter to be taken cognisance of by an assessor. Thus where the owner of a shop in which a fish restaurant business had been carried on sold the business with fittings, goodwill, etc., for £500, to a purchaser to whom he also let the shop for a term of years, undertaking not to start a competing business, it was held that a part (though probably only a small

¹ *Hughes v. Stirling Assessor*, 1892, 19 R. 840.

² *Nicholson v. Port Glasgow Assessor*, 1886, 23 S.L.R. 603.

³ *Crawford v. Haddington Assessor*, 1896, 23 R. 685.

⁴ *Cousin v. Edinburgh Assessor*, 1928 S.C. 393, at p. 395.

part) of the value of the goodwill might be attributable to the heritable subjects, and that the assessor was not bound therefore to accept the yearly rent as the true annual value.¹

SECTION 11.—GOODWILL IN RELATION TO IMPERIAL TAXES.

SUBSECTION (1).—*Death Duties.*

1273. Of the imperial taxes to which contributions in respect of goodwill may be a factor, the most important are the Death Duties represented by Estate Duty, Legacy Duty, and Succession Duty. Goodwill is undoubtedly an element which may, and where it exists usually does, enhance the value of a property passing on death, and so it is a fit subject for estimation in dealing with a claim for estate duty. But the extent to which it is an asset assessable for duty is a question of circumstances and must be decided upon the facts of each particular case. In dealing with estate duty, it is obvious that there is no room for question as to the extent to which goodwill is local and attached to the property in which a business has been carried on rather than to the connection and reputation of the trader. For the purpose of this particular duty, what is relevant is its value as a whole. But it may quite well be that on analysis, although a price has been paid to someone—even to the executor—by a party taking over the business, that price is found to have no relation to anything which could be said to form part of the estate of the deceased person the duty on whose succession is in question.² Or again the price, while partially attributable to elements of goodwill which were properly *in bonis* of the deceased, may to a greater or less extent be attributable to other elements such as introductions undertaken to be given or restraints come under by the relatives of the deceased—in short, the various considerations already dealt with as entering into the question of the claim of the representatives of a party who has died to sums received in respect of the acquisition of a business carried on by him.³

1274. The principal illustrations of these considerations occur in connection with goodwill of the practices of professional men.⁴ The result of the cases would seem to be that the sum which can be claimed by the revenue authorities, as falling to be included in respect of goodwill as part of the estate of a person deceased for the purpose of estate duty, is just such sum as might fairly be expected in the whole circumstances of the particular case to be obtained from one purchasing the business as it stood in the deceased, but without the possibility of the introductions which he could have given, without obligations to introduce or restrictions upon competition undertaken by surviving relatives, and in the knowledge that these relatives (not being the executors selling) may engage in a similar business, and may be in a position to attract custom through

¹ *Edinburgh Assessor v. Cairn & Crolla*, 1928 S.C. 398.

² See *Bain v. Munro*, 1878, 5 R. 16.

³ See para. 1252 *et seq.*, *supra*.

⁴ See para. 1234 *et seq.*, *supra*.

their personal influence and the sympathy to which they can appeal. This, it is obvious, may not infrequently be a sum very different from what may actually have been obtained on a sale of the business concurred in by the relatives, and in which the purchaser is assured of their active aid in introduction or even of their abstention from competition.

1275. The value of goodwill as an asset for the purposes of death duties is always a question of fact to be arrived at upon evidence either of actual sale or upon an estimate of the commercial probabilities of the price obtainable under the circumstances existing. It is not to be governed by the value at which the testator authorises his trustees to make over the business to a son or other favoured beneficiary.¹ So, while it was held that where, under a partnership agreement, sons were given a right upon the death of their father to acquire his share in the business upon terms in which no allowance seems to have been made for goodwill, but the sons on their part came under onerous obligations in the contract to their father, the revenue authorities had no further claim in respect of the goodwill as being property "passing on death" under either s. 1 or s. 2 (1) of the Finance (1909-10) Act, 1910,² on the ground that the goodwill had no independent appreciable value, this seems to be a decision upon fact rather than law. The Court apparently regarded the onerous obligations undertaken by the sons as amounting to a fair purchase price for the whole subjects, including any possible element of goodwill.³ So also it has been decided that where under a contract of copartnery provision is made for the exclusion of any sum for the goodwill of the business in distribution of the partnership assets, and a question arises in respect of a claim for estate duty, it is for the Court and not for the Special Commissioners to determine whether there has been a full or partial consideration in money or money's worth paid *inter vivos* for the goodwill, and also the value of that consideration.⁴

SUBSECTION (2).—*Income Tax and Super-Tax.*

1276. Where the price paid for goodwill on the dissolution of a copartnery takes the form of an annual charge on the profits of the business, this charge will form a good deduction from the gross profits in arriving at the profits which form the income of those subsequently carrying on the business. Thus, on the dissolution of a copartnership of which the financial year ended on 31st December, one of the partners on retiring received a fixed sum in full satisfaction of his share in the profits of the year current at the date of dissolution, and it was further provided that there should be paid to him quarterly "out of the future profits of the business" certain sums amounting to £500 for the first

¹ *Lord Advocate v. Wood's Trs.*, 1910, 1 S.L.T. 186.

² 10 Edw. VII. and 1 Geo. V. c. 8.

³ *Attorney-General v. Boden*, [1912] 1 K.B. 539.

⁴ *In re Weir & Pott's Contract*, 1911, 55 Sol. J. 536; *Attorney-General v. Boden*, *supra*.

year and gradually diminishing until the fifth year. It was held that in estimating the income of one of the remaining partners for the purpose of super-tax his income for the year following the dissolution fell to be taken on the footing of the *pro rata* share of the actual profits of the firm for that year to which he was entitled under the original contract, although as it happened the fixed sum paid to the retiring partner in satisfaction of his share of the profits of that year had to be met out of the shares of the remaining partners; but that the annual sums payable after retiral formed a good deduction from the profits of the respective years in which they were payable before arriving at nett profits for purposes both of income tax and super-tax.¹

SUBSECTION (3).—*Excess Profits Duty.*

1277. An executor who had sold the goodwill of a deceased trader's business but had retained the stock and gradually sold it off, was held to be a "person carrying on the business" within the meaning of the Finance Act, 1918,² and so accountable for excess profits duty.³ The Excess Profits Duty (Loss of Goodwill) Regulations, 1922,⁴ made under s. 40 (3) of the Finance (No. 2) Act, 1915,⁵ and to have effect from the commencement of that Act, modified Schedule 4 of the 1915 Act if there were loss of capital expended on goodwill in the case of a controlled establishment when the owner had reverted to his former business within four years from the date of decontrol, or had at the request of the Government disclosed to other parties information upon his methods of manufacture, etc., plans, patterns, or secret processes. Where a contract of copartnery provided that the share of goodwill of a partner deceasing should be paid out on the footing of a proportion of "the profits of the business" for the four years preceding his death as such profits should be ascertained from the profit and loss accounts for these years, and in the accounts the profits available for distribution among the partners were ascertained after deducting excess profits duty, it was held that in calculating the share of goodwill of a partner who had died "profits" meant profits available for division after deduction of this duty.⁶

SUBSECTION (4).—*Site Value Duty.*

1278. In dealing with the amount of the deduction from the consideration in respect of the difference between gross value and full site value under the Finance (1909–10) Act, 1910,⁷ it was held that the total value must be ascertained by valuation and could not be taken merely as if it were the consideration for the sale, and, further, that a deduction

¹ *Rutherford v. Inland Revenue*, 1926 S.C. 689.

² 8 & 9 Geo. V. c. 15, s. 35 (2).

³ *Guest's Exrs. v. Inland Revenue*, 1921 S.C. 440.

⁴ S.R. & O., No. 384.

⁵ 5 & 6 Geo. V. c. 89.

⁶ *Bishop v. Nicol's Trs.*, 1921 S.C. 229.

⁷ 10 Edw. VII. and 1 Geo. V. c. 8.

from the total value of something "for goodwill or other matter personal to the owner, etc., interested for the time being in the land" could be sustained only upon distinct proof to the satisfaction of the Commissioners that a part of the total value was directly attributable to such matter and had therefore actually been included as part of the total value.¹

¹ *Inland Revenue v. Walker*, 1915 S.C. (H.L.) 1.

GOWPEN.

See THIRLAGE.

GRASS.

See CHURCH; HYPOTHEC; LEASE.

GRASSUM.

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SECTION 1.—MEANING AND HISTORY.

1279. Grassum is a sum of money paid or promised by a tenant to his landlord at the grant or renewal of his lease, or by a feuar to his superior at the grant of the feu-right, in addition to the periodical rent or feu-duty stipulated for in the grant.¹ Originally it was the technical term for the fine or premium payable by a kindly tenant under that species of lease known as a rental right, as an acknowledgment by the kindly tenant or rentaller to his lord on entering the holding; and the term was so closely connected with these rental rights, and deemed so much the distinguishing mark of them, that in early days the mere payment of a grassum was held to presume kindliness.² The kindly tenants in these rental rights probably represented the villeins or bondsmen of the ancient law who were all along connected with the land, and the rights to them seem to have been analogous to the tenure of copyhold in England and were held chiefly under the Crown and Church, though occasionally also under the greater barons. In course of time these rights came to be regarded as hereditary rights of the nature of perpetual tacks or successive liferents descendible to heirs, but the rents payable by the kindly tenants continued very favourable, sometimes illusory, though it would seem that the grassums payable by a successor on his entry were considerable as compared with the rents themselves.³

1280. Rental rights have disappeared in modern practice, and an intention to create them will not be easily presumed;⁴ but from them the idea of grassums, affording as they did facilities of raising an

¹ Cp. Craig, ii, 10, 4: "Gressumas dicimus summas pecuniæ quæ in principio assedationis aut solvuntur aut promittuntur supra annuam mercedem."

² Craig, ii, 10, 4; Stair, ii, 9, 16, 20; Mack. ii, 6, 9; Ersk. ii, 6, 37; Craig, ii, 9, 34.

³ The grassums in Glasgow Church lands seem to have been ten to twelve times the annual rents; Bain and Rogers, Diocesan Registers of Glasgow, i, Introd. p. 27.

⁴ See *Wilson v. Wilson*, 1859, 21 D. 309.

immediate fund, was early adopted into ordinary leases and other forms of right involving recurring payments. Already in the eighteenth century Erskine had occasion to note¹ that grassums were frequently given by tenants on their entry, when neither the landlord nor the tenant meant to constitute a rental right; and nowadays grassum is used generally to denote any lump sum payable under a contract in addition to the periodical payments thereby stipulated, *e.g.* the extra payment or duplication stipulated in a modern contract of ground annual is often referred to as a grassum.² In contracts such as leases, etc., the payment of or stipulation for a grassum has important results.

SECTION 2.—POWER TO STIPULATE FOR GRASSUMS.

SUBSECTION (1).—*Absolute Proprietor.*

1281. The power of administration of an absolute proprietor is burdened by no equity in favour of his successors in the lands, and so he may contract in relation thereto on whatever terms he thinks proper. Accordingly, no question as to his right to stipulate for and to take grassums can arise. No matter how large the grassum stipulated for in a lease, an absolute proprietor does not appear to be under any restraint in relation to the right of a subsequent purchaser of the lands, provided that the rent actually reserved is not illusory.³ A tenant under a lease with a grassum has the same protection against successors as a tenant under an ordinary lease;⁴ and if the tenant be in possession of the subjects let and the rent payable by him is not illusory and is sufficient to satisfy the Act 1449, c. 17, a singular successor has no right of challenge merely because the lease was given on a grassum. In the same way, a creditor of the proprietor has generally no right to challenge⁵ a lease on the ground of grassum; but this statement may require qualification where there is a heritable creditor infeft in the subjects at the time that the right subject to a grassum is given. A lease, to be binding on such heritable creditor, must be a fair and reasonable act of administration, not unfairly trenching on the bondholder's security.⁶ A long lease with a large grassum is not an act *necessariæ et ordinariæ administrationis*. In *Wedgwood v. Catto*,⁷ where a lease had been granted for a small rent with a grassum, the Court were unanimously of opinion that such a lease was not granted in the course of ordinary administration and was accordingly reducible *ex capite inhibitionis*, although ordinary administrative leases are not affected by inhibitions.

¹ ii. 6, 37.

² See, *e.g.*, Feudal Casualties (Scotland) Act, 1914 (4 & 5 Geo. V. c. 48), s. 3, definition of casualties.

³ Bell, Com. i. 69; Bell's Prin., s. 1201.

⁴ Bell's Prin., s. 1201.

⁶ *Reid v. M'Gill*, 1912, 50 S.L.R. 5.

⁵ *Ibid.*, s. 1229.

⁷ 13th November 1817, F.C.

SUBSECTION (2).—*Limited Proprietors.*

1282. Where a person has only a limited or fiduciary title to lands he is bound to exercise his powers of administration consistently with the legitimate interest of his successors. The stipulation for a grassum, being an act outwith the fair and ordinary administration of the lands, cannot without special authority be competently made by mere administrators. Accordingly, factors and tutors are not entitled to grant leases with grassums.¹ So by statute a minister, although entitled to let his glebe, could not stipulate for a "foregift or grassum."² Professor Rankine³ also doubts whether a royal burgh can lease with a grassum; but there would seem to be no incompetency in a royal burgh as a proper corporation doing so, provided that the lease was fairly entered into and all legal formalities duly complied with. It would seem that royal burghs at one time occasionally did grant leases with grassums,⁴ and in the old days they had also the power of granting rental rights which inferred grassums.⁵ Colleges can also apparently grant leases with grassums.⁶ In mineral leases by the Crown, power to take grassums has been expressly conferred by statute.⁷ Where land is acquired by an undertaking under the Lands Clauses Acts in consideration of a feu-duty or ground annual, a grassum may not be paid.⁸

SUBSECTION (3).—*Entails.*

1283. Questions about leases with grassums have in our more recent law chiefly to do with heirs of entail; and generally speaking, while fair and ordinary leases by heirs of entail are good at common law, leases in which grassums are taken are reducible at the instance of succeeding heirs of entail as being in effect frauds on the entail and alienations *pro tanto* of the uses and profits of the estate. The heir in possession is bound to administer the estate *secundum bonum et æquum*, and must not stipulate for himself more than what is payable as rent during the currency of the lease. If he stipulate for a grassum in addition to the annual rent, the real rent is held to have been so far anticipated, resulting in a diminished rent during the subsequent years, and this will render the lease invalid as in a question with succeeding heirs. This is the result of the cases arising out of the *Queensberry Leases* decided in the House of Lords in 1819.⁹

¹ Stair, ii. 9, 13; Bankt. ii. 9, 41; Rankine on Leases, 3rd ed., p. 13.

² 29 & 30 Vict. c. 71, s. 3.

³ Rankine on Leases, p. 37.

⁴ See *Earl of Wemyss v. Murray*, 17th November 1815, F.C., as cited by Hunter, Landlord and Tenant, i. 153.

⁵ *Earl of Galloway v. Tailzifer*, 1627, Mor. 7193-4-5.

⁶ See *Maxwell v. College of Glasgow*, 1745, Mor. 15744.

⁷ 29 & 30 Vict. c. 62, s. 3.

⁸ Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4.

⁹ 1819, 1 Bligh 339; 5 Dow 297.

1284. It had been usual to have leases with grassums on the analogy of a rental right which—it is to be remembered—was a form of lease well known when the Entail Act of 1685 was passed; and the legal opinion of the eighteenth century on the whole seems to have favoured the view that an heir of entail was entitled to stipulate for a grassum, and that before such a lease was objectionable there had to be, in addition to a mere grassum, some other element which (or the effect of which) constituted a fraud on the right of the succeeding heirs. Grassums on the granting of leases, however, had developed to such an extraordinary extent (as appears from the *Queensberry Leases* case)—partly as a device to provide for widow and children and partly also in some cases to defeat the rights of succeeding heirs—that in practice such leases did constitute a fraud on the succeeding heirs. In one or two earlier cases¹ grassums existed and seem to have been recognised, though their legality was not put in issue or insisted on. When the *Queensberry Leases*² came up, their legal effect was thus still open. Further, in the case of valuations of teinds, grassums had been recognised as anticipated rent.³ In cases of forfeiture, leases with grassums were treated as alienations;⁴ and following this, in the *Queensberry Leases*² the House of Lords held that a grassum is anticipated rent, and therefore a lease made with a grassum paid to the granter is an alienation *pro tanto* of the rent; that by taking a grassum the heir in possession does effect a diminution of the rent and does not take the just avail of the land at the time, and that leases involving these qualities are void; and further that if the original lease be reducible on the ground that a grassum was taken, the device of surrendering that lease and taking a new lease without grassum will not avail. Bonds and bills taken by heirs of entail for annual sums during the currency of the leases will be accounted as truly representing current rent and adjudged to belong to subsequent heirs.⁵

1285. The decision in *Queensberry Leases*,² it will be noted, in effect struck at rental rights and rendered these rights invalid also, though such a result could hardly have been in contemplation when the Entail Act was introduced in 1685; but the principles laid down in the House of Lords were recognised as sound, for there could be no doubt that the taking of grassums, if allowable, was open to abuse, and again the precise amount for which an heir of entail might legally stipulate could not be ascertainable on any determinate principle. The Aberdeen Act,⁶ which was passed shortly afterwards, by allowing provisions to be made for widows and children, removed the main ground on which grassums were in use to be justified. The decision accordingly has been taken

¹ See *Leslie v. Orme*, 1779, Mor. 15530; *affd.* 1780, 2 Pat. 533; *Elliot v. Elliot*, 1793, Mor. 15622; *Elliot v. Currie*, 1798, Mor. 15450.

² 1819, 1 Bligh 339; 5 Dow 297.

³ See *Maxwell v. College of Glasgow*, 1745, Mor. 15744.

⁴ *Dalzell v. Tenants of Caldwell*, 1674, Mor. 4685.

⁵ See *Denham v. Wilson*, 1761, Mor. 15512.

⁶ 5 Geo. IV. c. 87.

as laying down the law that an heir in possession must act in good faith and that he will not be permitted to stipulate for a grassum and thus prejudice succeeding heirs; and this has been consistently recognised and followed in all the entail statutes since—the powers enabling feuing and leasing being always subject to the qualification that no grassum is taken.¹ If an heir take a grassum, the remedy of a substitute heir is a declarator of irritancy of the contravener's right and reduction of the offending lease, not an action of damages for loss sustained.²

1286. But where the terms of the deed of entail are such as to admit of leases with grassums being granted, the rule would seem to be that, provided the heir in possession complies with the terms of the entail, the lease will be unobjectionable although granted in consideration of a grassum paid to the heir.³ In such case the heir who receives the grassum is not under any obligation to distribute it or to invest it for behoof of succeeding heirs.

SECTION 3.—EFFECT OF GRASSUM.

SUBSECTION (1).—*Informal Leases.*

1287. In informal leases the acceptance of a grassum will, on the principle of *rei interventus*, often be strong confirmatory evidence that the parties had in contemplation a lease of longer duration than one year. This was held in an old case of a verbal lease;⁴ and in a later case,⁵ where a lease was proved as to the rent and the lands by a written missive but was verbal as to the duration, the lease was sustained for nineteen years in respect that the tenant had paid a grassum and expended a considerable sum on a house and offices, because these proceedings—the payment of the grassum and the other expenditure made—could be referable only to a bargain for a term of years and should not have been permitted unless that bargain was to be implemented.

SUBSECTION (2).—*Rating.*

1288. Where a grassum is payable in terms of a lease, the annual valuation of the subjects for rating is also affected. Under the Lands Valuation Act of 1854,⁶ where lands and heritages are *bona fide* let for a

¹ See, e.g., Montgomery Act (10 Geo. III. c. 51), s. 7; Rosebery Act (6 & 7 Will. IV. c. 42), s. 1; Rutherford Act, 1848 (11 & 12 Vict. c. 36), s. 24; Entail Act, 1853 (16 & 17 Vict. c. 94), ss. 14, 15; Lands Clauses Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4; Entail Act, 1868 (31 & 32 Vict. c. 84), s. 3; Entail Act, 1882 (45 & 46 Vict. c. 53), s. 6; Entail Act, 1914 (4 & 5 Geo. V. c. 43), s. 4.

² *Marquis of Queensberry v. Duke of Queensberry's Exrs.*, 15th November 1815, F.C.; 1820, 6 Pat. 551; 1826, 4 S. 320; 1828, 6 S. 706; revd. 1830, 4 W. & S. 254.

³ See *Wellwood v. Wellwood*, 1823, 2 S. 475; Bell, Com. i. 69; Bell's Prin., ss. 1228, 1229.

⁴ *Laird of B. v. A.*, 1553, Mor. 8410, 15209; see also Balfour's Practicks, p. 203.

⁵ *M'Rorie v. Gray & M'Whirter*, 18th December 1810, F.C.; see also *Earl of Aboyne v. Ogg*, 1810, Hume 847; Rankine on Leases, p. 130.

⁶ 17 & 18 Vict. c. 91, s. 6.

yearly rent conditioned as the fair annual value thereof "without grassum or consideration other than the rent," such rent is to be deemed and taken as the yearly rent and valuation of such lands and heritages in terms of the Act. If in addition to the rent there is a grassum or definite sum payable, this and the stipulated rent combined represent what the landlord *de facto* gets for his lease; and in fixing the annual value under the Act the practice is to divide the grassum or definite sum by the number of years which the lease has yet to run and add the quotient annually to the stipulated rent.¹ This, it may be noted, was the rule which was adopted in the eighteenth century for ascertaining the "constant" rent of the lands for a valuation of teinds where there was a grassum. In the case of a let of nineteen years with a grassum it was held that a nineteenth part of such grassum was in the valuation to be added to the rent.² It has been doubted whether, where a lease contains a consideration other than rent in the form of a grassum alone, this method of spreading the grassum over the years of the lease is absolutely conclusive as to the annual value under the Lands Valuation Act for the whole duration of the lease, seeing the statute has not made it so;³ but an alteration on such value is not likely to be made unless in very special circumstances.

SUBSECTION (3).—*Feu-rights.*

1289. In feu-rights a grassum paid on a constitution of a subfeu affects the quantum of the composition which is payable by a vassal on his entry with the superior and, as a consequence, the amount of the redemption-money payable on the redemption of such composition under the Feudal Casualties (Scotland) Act, 1914.⁴ It is settled that where a vassal has subfeued his lands for a competent subfeu-duty and is called on to pay a composition to his superior, the superior is not entitled to ask for more than the yearly value of the estate to which alone an entry is sought—that is, the composition is measured by the subfeu-duty payable by the subfeuar to the vassal, for that subfeu-duty represents a year's mail of the vassal's estate "as the land is set at the time" under the Act 1469, c. 36.⁵ If, however, in addition to the subfeu-duty stipulated, a grassum is paid, that grassum is looked on as a capitalisation of subfeu-duty which otherwise would have been stipulated for and payable, and accordingly in that case the true yearly value of the vassal's estate is the subfeu-duty actually stipulated for in the feu-contract plus interest on the grassum, and the year's mail

¹ *Macdonald, Fraser & Co. v. Assessor for Glasgow*, 1893, 20 R. 624; *Shiel v. Assessor for Hawick*, 1898, 25 R. 592.

² *Maxwell v. College of Glasgow*, 1745, Mor. 15744.

³ See opinions in *Mark v. Assessor for Edinburgh*, 1911 S.C. 974.

⁴ 4 & 5 Geo. V. c. 48.

⁵ *Cockburn Ross v. Heriot's Hospital*, 6th June 1815, F.C.; 1820, 6 Pat. 640; 2 Ross, L.C. 193; as to a nominal feu-duty, *Mason v. Ritchie's Trs.*, 1918 S.C. 466, and comments thereon in *Duke of Richmond v. Countess of Seafield*, 1927 S.C. 833.

fixing the superior's composition will be the subfeu-duty plus interest on the grassum.¹ The rate of interest on the grassum in such case in practice is taken at 5 per cent., but though this rate is authoritative it is not necessarily absolute.² Where a vassal holding lands of different superiors subfeus them as one estate with an unappropriated grassum and a nominal subfeu-duty, the composition to each superior in that case is calculated on the basis of the year's interest on such part of the grassum paid for the whole estate as effeirs to the portion of which he is superior.³

SUBSECTION (4).—*Ground Annuals.*

1290. Grassums in ground annuals correspond to duplications of feu-duties. They fall within the scope of the Feudal Casualties Act, 1914, and if not redeemed in terms of that Act will disappear in 1930,⁴ subject to s. 4 (3) of that Act as to processes then pending.

SECTION 4.—APPORTIONMENT.

1291. In *Ewing v. Ewing*,⁵ in a question between liferenter and fiar, a grassum or duplication of a ground annual which was received was treated as extraordinary profits and held to belong to the fiar, and if payable it would be payable by the fiar.⁶ Such a question is not likely now to arise in view of the Feudal Casualties Act, 1914, abolishing duplications; but if it did, the intention as ascertained from the deed would determine whether the grassum was to be considered capital or income.⁷ There does not seem to be any direct authority as to the apportionment of a grassum paid in consideration of the grant of a lease. Such a right, however, granted by a liferenter who has power to give a lease extending beyond his own liferent, would not, on the principles already stated, be binding on the fiar as not being an act of ordinary administration. If the lease were granted by trustees holding the estate for interests in liferent and fee with power to grant leases with grassums, the question would depend on the terms of the particular deed or instrument creating the trust. Apart from special provision, however, a grassum, being in effect rent paid in advance in which the fiar would otherwise be interested, would have to be apportioned between liferenter and fiar, in which case the grassum would be probably divided over the years of the lease and apportioned accordingly.

¹ *Campbell v. Westenra*, 1832, 10 S. 734; approved in *Heriot's Tr. v. Mason's Trs.*, 1912 S.C. 1123, overruling *City of Aberdeen Land Association v. Mags. of Aberdeen*, 1904, 6 F. 1067.

² *Campbell v. Westenra*, *supra*; *Smith Shand's Trs. v. Forbes*, 1922 S.C. 351.

³ *Smith Shand's Trs. v. Forbes*, *supra*.

⁴ 4 & 5 Geo. V. c. 48, ss. 3 and 4.

⁵ 1872, 10 M. 678; *Gibson v. Caddell's Trs.*, 1895, 22 R. 889.

⁶ *Edgar's Trs. v. Edgeware*, 1915 S.C. 175.

⁷ *Montgomerie Fleming's Trs. v. Montgomerie Fleming*, 1901, 3 F. 591; *Macdougall's Factor v. Anderson*, 1908, 46 S.L.R. 172; and see *Edgar's Trs. v. Edgeware*, *supra*.

GRAVESTONES.

See BURIAL AND CREMATION.

GREAT AVIZANDUM.

See PRACTICE AND PROCEDURE.

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GROUND ANNUAL.

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SECTION 1.—NATURE AND HISTORY.

1292. “Ground annual is not a *vox signata*; I think it simply means a perpetual rent charge secured in some effectual fashion as a real burden on land.” This definition is the one recently given by Lord Dundas;¹ but in ordinary conveyancing ground annual has a more limited signification, and means a reserved real money burden by way of annuity or perpetual rent charge. It is competent to create a rent charge or annual by direct grant as well as by reservation.² This may be done by way of bond of annuity and disposition in security in favour of the creditor in the annuity or annual;³ and in some few cases relating to entails and referred to by Lord Dundas, bonds of annual rent and rent charges for improvements are made by direct grant.⁴ The rights conferred by such direct grant, however, are not usually referred to as ground annuals, and in the Style Books the form given for constituting ground annuals is a form for constituting them by reservation.⁵

1293. Annual rights are of very ancient origin, and derive from the old rent charge whereby a proprietor assigned a portion of the rents issuing from his lands, and charged the lands to the intent that the assignee or renter should, for the rent assigned, have the same power of distressing the tenants and possessing the lands as he had himself.⁶ This form may be accounted for by the prohibition of the Canon law against lending money at interest, in place of which the creditor bought from the debtor an annual rent or yearly revenue out of the debtor's rents, corresponding to interest on the money lent; and annuities in

¹ In *Church of Scotland Endowment Committee v. Provident Association of London*, 1914 S.C. 165.

² Bell's Prin., s. 908; and cp. *Church of Scotland Endowment Committee*, *supra*.

³ Bell's Prin., s. 887.

⁴ See, e.g., 38 & 39 Vict. c. 61, s. 8; 41 & 42 Vict. c. 28, s. 3; 45 & 46 Vict. c. 53, s. 6.

⁵ Cp., e.g., Scots Style Book, vol. v. p. 9.

⁶ Ross, Lect. ii. 321; *College of St. Andrews v. Crs. of Newark*, 1762, Mor. 10171, referring to a grant of a rent charge or annuity made in 1477 without infektment.

this shape, according to Erskine,¹ continued in use in his day in several Roman Catholic countries where interest was not allowed. In Scotland under the influence of the feudal law the rent charge developed into various varieties of annual rent rights—the ground annual, the top annual, and the feu annual—all of which are mentioned in the Act 1551, c. 10, passed to settle disputes about the respective rights of parties following on the destruction of Edinburgh in the minority of Queen Mary. The distinction of these varieties of annual rent rights has not been very accurately ascertained,² but it seems clear that ground annual had then the meaning it still properly has of a rent charge by reservation. In commenting on the Act, Skene says that “ground annual is esteemed to be, when the ground and property of any land, bigged or unbiggered, is disposed and annailled for an annual to be paid to the annailler thereof or to one other certain person sic as any chaplain or priest.” The reference to chaplain or priest may be noted. Annual rent rights, which seem to have been located chiefly in burghs, were a favourite form of investment of the clergy before the Reformation, and were often mortified to the religious houses as part of the patrimony for the subsistence of the clergy. After the Reformation, with the disappearance of the restrictions of the Canon law, the direct rent charge by deed as a form of security offered advantages as compared with a rent charge by reservation; and the direct charge or infeftment of annual rent thus gradually developed through various intermediate stages into the modern bond and disposition in security—that is, the rent charge was associated with security for money lent, the infeftment of the annual rent being granted directly in security, and later subjoined to a personal obligation for the principal sum due.³ The ground annual or charge by reservation, however, had not the same possibilities of development, and remained associated with burghs where it came to be the invariable method of creating a rent charge on burghal property.⁴

SECTION 2.—CONSTITUTION.

1294. The method of constituting the ground annual as a burden by reservation has gone through various stages, and has developed into its present form only in comparatively recent times with the extension of building in burghs. In its original form it was constituted by a simple conveyance, whereby the proprietor “annailled” the lands to the disponent under reservation of the annual to be paid to the disponent or

¹ Ersk. ii. 2, 5.

² Skene, *De verborum significatione*, s.v. “Annuell,” and see Craig, i. 10, 38; Stair, ii. 5, 7.

³ Ross, Lect. ii. 325; cp. Dallas, Styles, p. 701, and *Rankin v. Arnot*, 1680, Mor. 572; 3 Br. Supp. 363, where infeftment of annual rent as accessory to a personal bond is referred to as a “new” form.

⁴ Ross, Lect. ii. 325. See also *Healy and Young’s Tr. v. Mair’s Trs.*, 1914 S.C. 893, per Lord Skerrington.

his heirs or assignees or to some other person. In some cases there was incorporated in the deed a power to redeem the annual on payment of a capital sum. This simple form was not very satisfactory owing to the limited nature of the remedies available for enforcing payment. In its second stage, when the giving out of building stances in burghs became common after the middle of the eighteenth century, the practice grew up whereby the creditor in disposing the lands which were to be subject to the annual obtained from the original disponent, or had incorporated in the deed of transfer, a personal obligation by the disponent to make payment of the stipulated annual. This practice of taking a personal bond or obligation was probably affected by the practice which then obtained of taking a personal bond for the unpaid price of lands when on a sale the seller agreed to allow part of his price to continue as a debt affecting the subjects, and in the disposition to the purchaser had that declared a real and preferable burden on the lands. This was an improvement on the original form, but still lacked something for the security of the creditor. A personal bond did not give full protection, and in the final stage of development the creditor fortified his position by stipulating for a personal obligation, and in addition for direct infeftment in the lands subject to the annual in security of the due payment of his annual.

1295. A ground annual accordingly in its modern form is constituted by a complex and somewhat clumsy deed in the form of a contract called a contract of ground annual. In the first part of this deed the proprietor of the lands disposes the lands under reservation of the agreed-on annual, which is declared a real burden and fenced with irritant and resolute clauses, and then follow the usual formal clauses appropriate to an ordinary disposition—term of entry, assignation of rents, etc. In the second part the disponent binds himself to pay the annual, in the form more or less appropriate to an ordinary bond of annuity, and also to implement the other obligations (if any) imposed in the preceding part of the deed, and he then conveys to his disponent—the creditor of the annual—in real security of his obligation, not only the ground annual previously reserved, but also the land out of which it is payable, with the usual formal clauses appropriate to such a security. The recording of the contract—usually for preservation and execution as well as for publication—completes the disponent's right to the lands disposed, and also the disponent's real right to the ground annual to issue from these lands. A double warrant of registration is necessary, one in favour of the disponent in respect of the conveyance of the lands to him, and the other in favour of the disponent (who is divested by the conveyance to the disponent) in respect of the disponent's reconveyance of these lands in security.

1296. A ground annual in practice is a substitute for a feu-duty. The increase of this form of right in recent times is due to the development of building in or near towns, and is referable to two causes: (1) the land was often held by burgage tenure, and before 1874 lands held

by that tenure could not be feued by individual proprietors;¹ (2) the lands might be subject to a valid prohibition against subinfeudation. In such cases, if a seller wished to sell his ground for an annual return rather than for a capital sum, he could only effect his purpose by a contract of ground annual. Since 1874 burgage lands can be feued out, and accordingly a contract of ground annual need now only be resorted to where there is a valid prohibition against subinfeudation.

1297. In modern contracts of ground annual there are, as a rule, in addition to the money return, elaborate building conditions and restrictions such as are usual in feu contracts of building ground, and the deed in fact closely follows the form of a feu-contract. It has to be kept steadily in view, however, that the deed of constitution of a ground annual—whether in its older and simpler forms or in the more elaborate modern forms—remains but a simple disposition under a reserved money burden. By the very constitution of the ground annual the original creditor parts with the lands which are subject to the annual, and the creditor's right in the lands thenceforth is but a right of a creditor in a real burden affecting the lands. For the ground annual to be effective as a real burden it is essential that the requisites of such a burden be present. The words constituting the annual must appear in the dispositive clause of the disposition conveying the subjects to the donee, and must qualify the words by which the right to the lands is transferred or transmitted.² The amount must be specific, for the law does not recognise an indefinite burden as attaching to lands;³ the creditor in the burden must be clearly marked out or ascertainable;³ the annual must be declared a real burden, or other words must be used showing clearly that the intention is that the burden is to affect the lands and run with them;⁴ and the burden must enter the Register of Sasines.⁵ These conditions being satisfied, the annual becomes a real right, which qualifies the fee of the subjects in the hands of singular successors acquiring from the original donee.

SECTION 3.—QUALITY AND EFFECT.

1298. But while a ground annual is a substitute for a feu-duty, and resembles a feu-duty in that it is an annual money payment from land, there are essential differences in legal effect between a ground annual and a feu-duty, arising from the very nature of the two rights. A feu-duty presupposes a feu-contract, and by a feu-contract a new legal estate is created; but no new estate is created by a contract of ground

¹ See Conveyancing (Scotland) Act, 1874, 37 & 38 Vict. c. 94, s. 25.

² Bell's Prin., s. 920; *Cowie v. Muirden*, 1891, 18 R. 706; revd. 1893, 20 R. (H.L.) 81.

³ *Stenhouse v. Innes & Black*, 1765, Mor. 10264.

⁴ *Mackenzie v. Lord Lovat*, 1721, 3 Ross, L.C.; *Mags. of Arbroath v. Dickson*, 1872, 10 M. 630.

⁵ *Allan v. Cameron's Crs.*, 1780, Mor. 10265; affd. 1781, 2 Pat. 572; *McDonald v. Place*, 1821, Hume 544.

annual, which merely transfers an estate already in existence. In a feu the vassal liable for the feu-duty is in theory in direct relation with the superior of whom the lands are held and who is in right of the feu-duty; and in coming under an obligation to pay the feu-duty the vassal (unless where the obligation is conceived in special terms¹) in effect binds himself only in his character as vassal; and accordingly when he transfers the feu to a singular successor and this successor is entered with or acknowledged by the superior, his liability for future feu-duties is at an end.² The position, however, is totally different in the case of a ground annual. The lands alone in the older deeds are responsible for the annual as a reserved real burden; and in the more modern forms, where there is a personal obligation for payment of the annual—whether that be granted in the contract of ground annual or contained in a separate personal bond—that personal obligation is an obligation collateral to the conveyance of the lands in favour of the original disponee, and so continues binding on the original disponee and his representatives (subject to s. 12 of the Conveyancing Act, 1874), in perpetuity, unless otherwise stipulated in the deed, and that although the original disponee may have transferred to a third party the lands which are subject to the burden.³ The obligation in such case is the obligation of a disponee—a party between whom and the disponent there is no “privity of estate”—and the obligation by the original disponee accordingly, being truly collateral to the conveyance in his favour, is to be construed like any other personal bond.⁴

1299. On the other hand, a singular successor who acquires a feu and takes up the *dominium utile* at once enters into direct relation with the superior of the lands; he becomes vassal of that superior, and is personally accountable for the feu-duty of the lands in which the superior still retains a direct interest; there is “privity of estate” between the superior and him. But this is not so in the case of a disponee of lands subject to a ground annual. The personal obligation contained in the original contract of ground annual does not transmit against a singular successor of the original disponee in the contract; the singular successor has nothing to do with that obligation; the annual is no doubt a real burden on the lands which he has acquired and runs with these lands, but the personal obligation does not transmit, and the singular successor does not become personally liable for it.⁵

1300. For the same reason, because there is no “privity of estate” between the original creditor who disposes the lands under burden of

¹ Cp., e.g., *Police Commrs. of Dundee v. Straton*, 1884, 11 R. 586; *Burns v. Martin*, 1887, 14 R. (H.L.) 20.

² See *Wallace v. Ferguson*, 1739, Mor. 4195; *Hyslop v. Shaw*, 1863, 1 M. 535; *Aiton v. Russell's Exrs.*, 1889, 16 R. 625.

³ *Millar v. Small*, 1849, 11 D. 495; revd. 1853, 1 Macq. 345, overruling *Peddie v. Scot's Trs.*, 1846, 8 D. 560; 3 Ross, L.C. 69.

⁴ Cp. *King's College of Aberdeen v. Lady James Hay*, 1852, 14 D. 675; revd. 1854, 1 Macq. 526.

⁵ *Gardyne v. Royal Bank*, 1851, 13 D. 912; revd. 1853, 1 Macq. 358.

the annual and a singular successor of his disponee, obligations *ad facta præstanda* in a contract of ground annual, such as obligations to erect buildings, etc., do not transmit against a singular successor.¹ In a feu-contract such obligations, if they have the quality of permanence and a natural connection with the object of the deed, are real and inherent conditions of the grant and enforceable as such.² But a person in right of a real burden "is in a totally different position from a superior with a continuing relation towards his vassal. Superior and vassal changing as their several properties change hands, yet continue in direct relation to each other; and conditions that are in their title may be enforced by the superior or by the vassal in consequence of their respective proprietary rights in the lands and the continuing relation between them."³ But the creditor in a ground annual has no contract with a singular successor in the lands; and while he may have in some cases an indirect compulsitor to ensure implement of his building obligations, etc., in virtue of the irritant and resolute clauses and the conveyance in security common in the modern form, this will depend on whether or not these obligations are truly real burdens affecting the lands. An obligation *ad factum præstandum* may be made a real burden on land provided it be sufficiently definite to satisfy the rule of law that no indefinite or unknown burden can be created on land;⁴ but it may be doubted if all the loosely framed and somewhat indeterminate obligations now in use to be inserted are sufficiently specific in character to satisfy this rule. There does not seem to be any authority in point. In *Marshall's Trs.*⁵ there was no conveyance in security, and *Tennant v. Napier Smith's Trs.*⁶ was special. In that case ground was conveyed by a contract of ground annual to a disponee with right to take water from a canal, under an obligation to pay a share of the expense of maintaining the canal, and a singular successor in the lands was held liable for the maintenance of the canal; but the decision proceeded on the ground that the obligation to maintain was the counterpart of the privilege of withdrawing the water, and that the defenders could not claim the privilege without submitting to the obligation.

1301. Again, liability for feu-duty attaches by the mere delivery of the feu-contract; but a ground annual by reservation only becomes real when the deed constituting it enters the record, the right of the creditor differing from other rights in that it depends on the debtor's infestment. The original disponee will, however, be bound for payment of the ground annual in virtue of his contract. In *Mags. of Inverness v. Bell's Trs.*⁷ a disponee under the disposition was bound by acceptance to build within a certain time, with and under the burden of a ground annual which was declared a real burden, and the disposition was signed by

¹ *Marshall's Trs. v. Macneill & Co.*, 1888, 15 R. 762.

² *Cp. Marquis of Tweeddale's Trs. v. Earl of Haddington*, 1880, 7 R. 625.

³ Per Lord Shand in *Marshall's Trs.*, *supra*, at p. 770.

⁴ See *Edmonstone v. Seton*, 1888, 16 R. 1.

⁵ 1888, 15 R. 762.

⁶ 1888, 15 R. 671.

⁷ 1827, 6 S. 160.

the disponee; and it was held that this was an agreement by mutual contract of sale, and that the obligation to build and to pay the ground annual was effectual. Here the question was with the original disponee, but it was recognised that the effect might be different with regard to a *bona fide* purchaser.

1302. A ground annual being a mere burden may be lost by prescription if the burden is omitted from the title of the owner of the ground;¹ but a feu-duty being an inherent condition of the grant creating the feudal estate is not lost; it is only arrears beyond the prescriptive period which are cut off.

1303. As a qualification on the right of the original disponee the ground annual will stand as a first charge on his right, and will rank preferably to all charges created subsequent thereto; but it will rank after any feu-duty payable in respect of the estate subject to the burden.

1304. Arrears of ground annuals, like arrears of feu-duty, do not bear interest *ex lege*.² In modern contracts interest is invariably stipulated for.

SECTION 4.—SUCCESSION.

1305. Ground annuals, being rights connected with or affecting heritable subjects, are heritable. The Conveyancing Act of 1874 made real burdens generally moveable in questions of succession where executors are not excluded, but it expressly excepted ground annuals. In questions of succession, therefore, ground annuals, whether redeemable or irredeemable, continue heritable.³ The reason suggested for the difference between them and other real burdens which are now moveable in succession where executors are not excluded, is that ground annuals were and are constituted to take the place of feu-duties.

SECTION 5.—CREDITORS' REMEDIES.

1306. A ground annual being a *debitum fundi*, the remedies competent to the creditor in the annual were originally confined to the ordinary remedies for enforcing such a real burden; and as there was no infeftment in the person of the creditor, he had no active title, and had to apply to the Court for power to make his right effectual against tenants in the lands. By special stipulation the creditor in the burden might have a power of sale,⁴ and as he had in law the right to adjudge, probably the right to sell might be so expressed as to imply a right to enter into possession.⁵ Such special rights were unusual. In

¹ See *King v. Johnston*, 1908 S.C. 684, per Lord Guthrie; Bell, Convey., 1156; Ersk. iii. 4, 6.

² Bell's Prin., s. 32, and cases there cited; *Moncrieff v. Lord Dundas*, 1835, 14 S. 61; and see *Napier v. Speirs*, 1831, 3 Ross, L.C. 109.

³ Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 30, and Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 118), s. 117.

⁴ *Wilson v. Fraser*, 1822, 1 S. 316; affd. 1824, 2 Sh. App. 162; 3 Ross, L.C. 23.

⁵ *Baillie v. Laidlaw*, 1821, 1 S. 108.

modern ground annuals the remedies available have been extended with the improvement in the form of the deed of constitution, and the Conveyancing Act of 1924¹ has now introduced a remedy, available to all creditors, analogous to the remedy *ob non solutum canonem* competent to a superior for his feu-duty.

1307. The remedies available to a creditor of a ground annual are (1) Action of poinding of the ground, referring back to the old distress for rent. (2) Adjudication, which gave an active title of possession by an action of maills and duties. These two remedies are competent in all cases. (3) In modern deeds where the creditor is infeft in the lands in virtue of a conveyance in security with an assignation of rents, an action of maills and duties.² By the Heritable Securities Act, 1894,³ the form of this action was improved and shortened, and it was made unnecessary to call the tenants of the lands conveyed in security, but the procedure under the 1894 Act was limited to creditors in bonds and dispositions in security, and accordingly a creditor in a ground annual to whom the action was competent had to use the older form in use prior to the Act and to call the tenants as parties. This has been altered by the Conveyancing Act of 1924. Under the latter Act,⁴ the Heritable Securities Act as modified by the Sheriff Court Act of 1907 is to apply to actions of maills and duties for the recovery of a ground annual in cases where such action of maills and duties is competent to the creditors. (4) If there be in existence a personal obligation by the original disponee of the lands subject to the annual, whether contained in the deed of constitution or separate from it, and the original disponee or his representatives are available, the creditor may hold them liable in the obligation, subject of course to the provisions of s. 12 of the Conveyancing Act, 1874. The personal obligation, however, is discharged by the obligant obtaining his discharge in bankruptcy.⁵ Recourse to the first disponee is not usual—it is valuable chiefly in recent contracts before buildings are erected; in other cases the creditor has generally to be content with recourse against the lands themselves. In this connection it may be noted that, where lands are acquired for a ground annual under the Lands Clauses Act, and the annual is not paid by the undertaking within thirty days after it becomes due and a demand is made in writing, the creditor is entitled to recover it by direct action in Court.⁶ (5) In modern deeds of constitution there is usually also a conventional irritancy, similar to the irritancy *ob non solutum canonem* in feu rights, whereby if the annual be in arrear for two years the right may be irritated. A similar remedy has now been given in all cases by the Conveyancing Act of 1924. By s. 23 (5) of that Act it is enacted that, if any ground annual is in arrear for two

¹ 14 & 15 Geo. V. c. 27.

³ 57 & 58 Vict. c. 44.

⁵ Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 20), s. 137; and see *Shaw v. Emery*, 1908, 24 S.C.R. 333 (decided by Sheriff Guthrie).

⁶ Lands Clauses Consolidation (Scotland) Act, 1845 (8 Vict. c. 19), s. 10.

² *Somerville v. Johnstone*, 1899, 1 F. 726.

⁴ Sec. 23 (4).

years together, the creditor holding a duly recorded title to the annual is entitled to have the lands from which it is payable adjudged to him absolutely. On decree in such action being pronounced and an extract recorded in the appropriate Register of Sasines, the land is to belong and pertain to the creditor in the ground annual "freed and disencumbered of all rights and burdens postponed to the ground annual, and the right in and to such land of such proprietor and any other persons called as defenders to such action shall be extinguished." The provisions of the Act apply to all ground annuals. The action is competent in the Sheriff Court or, where the annual exceeds £2, 10s., in the Court of Session.

1308. Under the Bankruptcy Act, 1913,¹ a creditor who holds a security over the heritable estate of the bankrupt preferable to the right of the trustee may execute a poinding of the ground after the sequestration, and such poinding, in competition with the trustee, is available for interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term. It has been held that this provision applies to a creditor of a ground annual on the bankruptcy of the owner of the lands subject to the annual, to the effect of enabling the creditor to recover arrears of his annual for a year—the annual being treated as interest on a debt of which the principal is the capitalised value of the yearly payments.²

1309. As a creditor in a *debitum fundi*, the creditor in a ground annual has sufficient interest in the lands to take action to protect his right. Even without an irritant clause in his deed he could probably get a declarator to the effect that his annual constituted a qualification of the right of the owner of the lands;³ and if the owner without communication with him proceeded to dilapidate the buildings on the land, or otherwise to impair his security, he would no doubt be entitled to interdict.

SECTION 6.—GRASSUMS.

1310. Just as in feu-contracts, it was usual also in modern contracts of ground annual to stipulate for a grassum or recurrent increase—usually a duplication—of the ground annual at regular intervals. Such grassums can no longer be stipulated for. The Feudal Casualties Act, 1914,⁴ provides that from and after 1st January 1915 it shall not be lawful to condition or stipulate for payment of any casualties (which includes grassums and other sums payable at intervals of more than one year), but it shall be lawful to condition for a permanent increase or reduction of the annual, provided the amount of such increase or

¹ 3 & 4 Geo. V. c. 20, s. 114.

² *Bell's Trs. v. Copeland & Co.*, 1896, 23 R. 650.

³ See *Wilson v. Fraser*, 1822, 1 S. 316; *affd.* 1824, 2 Sh. App. 162; *Cowie v. Muirden*, 1893, 20 R. (H.L.) 81, per Lord Shand.

⁴ 4 & 5 Geo. V. c. 48.

reduction shall be certain, and that the time or times from and after which such increase or reduction is to have effect shall also be certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which, under the terms of such condition or stipulation, the increase or reduction of the annual is to have effect. The Act also made provision for the redemption or commutation of grassums which had been stipulated for in contracts of ground annual before the Act came into force, and these, so far as not redeemed in terms of the Act before 1930, are abolished, subject to the provision in s. 4 (3) as regards grassums then the subject of judicial proceedings.

SECTION 7.—TRANSMISSION.

1311. Real burdens do not admit of infeftment in the person of the creditor, and the security of the creditor is peculiar in this respect, that it depends on the infeftment of his debtor. In this they differ from ordinary heritable securities, and this difference meant a corresponding difference in the mode of transmission. A ground annual in the old form required no sasine to its transmission; it was carried by general service¹ or by simple assignation.² Before 1874 the transfer was completed by intimation, and in competition the criterion of preference was priority of intimation. In *Miller v. Brown*,² which decided that the right was transmissible by assignation, the assignation was also recorded in the Register of Sasines, and there seems to have been a certain practice of so recording the deed of transfer, though this was unnecessary. The view of conveyancers, however, was in favour of such rights affecting land being recorded in the Register of Sasines,³ and this was required by the Conveyancing Act of 1874.⁴ Sec. 30 of that Act enacted that it should be lawful to record in the Register of Sasines any deed whereby any real burden is transferred or extinguished or restricted; and it further enacted that no deed or writing whereby any real burden upon land is transferred was to be effectual in competition with third parties unless it was recorded in the Register of Sasines; and that in competition priority depended on the date of registration, and intimation according to the previous law and practice was unnecessary where the deed or writing is recorded. Intimation, it is to be noted, though unnecessary, is not made incompetent, and as in a question with the debtor alone it will be effectual, and a sufficient title to discharge a burden. The recording is for publishing the creditor's right in the land affected by the burden. The recording is not, strictly speaking, infeftment, for a reserved burden does not admit of infeftment, but it is equivalent to infeftment in the proper sense. The creditor of a ground annual constituted in the modern form is truly infeft in lands in virtue of the conveyance of them to him in security of the obligations to pay the annual

¹ *Cuthbertson v. Barr*, 1806, Mor. "Serv. and Comp.," App. No. 2; 3 Ross, L.C. 27.

² *Miller v. Brown*, 1820, 3 Ross, L.C. 29.

³ See, e.g., comments in *Miller v. Brown*, *supra*.

⁴ Sec. 30.

undertaken by the original disponent; and a transfer by him was always recorded.

1312. Sec. 30 of the Conveyancing Act, 1874, also provided that real burdens (including ground annuals) might be assigned, conveyed, extinguished, or restricted, and the titles thereto completed as nearly as might be in the same manner as in the case of heritable securities requiring infestment; and that the provisions and forms in regard to bonds and dispositions in security and other heritable securities requiring infestment were as nearly as may be to apply. Since 1874 accordingly the various forms for assigning a bond and disposition in security have, with the necessary modifications, been the forms for assigning a ground annual. The Conveyancing Act of 1924 introduced shorter forms applicable to the constitution, transfer, and discharge of securities, and enacted that these forms are to apply generally to real burdens and ground annuals unless where the Act otherwise expressly provides.¹ For a ground annual a special form of assignation is given by s. 23.² The section enacts that this new form is to imply a destination to the heirs and assignees of the grantee, that the annual may be uplifted out of any part of the lands, and that the deeds constituting the annual and whole clauses thereof are to be carried by the assignation so far as the cedent has right thereto. The form given is also to imply a conveyance in security to the grantee of the lands out of which the annual is payable, and an assignation to the rents, mails, and duties thereof, but only "where the cedent can competently" grant such assignation in security—that is, the conveyance in security and assignation of rents, mails, and duties are implied only where the cedent himself is infest in security. The recording of a short assignation in the form given is to have the same effect as a duly recorded assignation or disposition and assignation in the form generally in use before the passing of the 1924 Act. Apart from this form of assignation, the forms for completing a creditor's title on transmission will, in terms of s. 43, follow the forms relating to bonds and disposition in security or transactions incidental thereto. As to these see COMPLETION OF TITLE.³

SECTION 8.—DISCHARGE AND RESTRICTION.

1313. Sec. 30 of the 1874 Act provided that discharges and deeds of restriction were to be as nearly as may be in the same form as discharges and restrictions of heritable securities; and the 1924 Act makes a similar provision.⁴ By s. 23 (2) and (3) of the 1924 Act special forms are given⁵ for discharges and deeds of restriction. These forms are practically the same as the forms for a discharge or a deed of restriction of a bond and disposition in security.

1314. Apart from express discharge, a ground annual as a burden on property may be lost by prescription. In order to preserve the security,

¹ Sec. 43.

² Sec. 23 (1) and Schedule K, No. 2.

³ Vol. IV. p. 247, *ante*.

⁴ Sec. 43.

⁵ Schedule K, 4 and 7.

the burden should be embodied or properly referred to in the subsequent titles of the lands from which it is exigible, otherwise it may be extinguished by prescription;¹ and in this respect the right is inferior to a feu-duty, the superior's right to which does not depend on its insertion in the vassal's sasine. The creditor has thus an interest to see that there is a valid reference made to the burden in the titles of the lands, and, as indicated, he could probably, apart from his remedy by way of irritancy, get a declarator that his annual constituted a qualification of the right of the owner of the land.² Provision, however, has now been made by the Conveyancing Act of 1924³ to meet the case of a failure to repeat or refer to conditions or clauses affecting the lands by the proprietor granting and recording a deed of acknowledgment.

1315. Of late years the question has also been mooted whether an annual may not also be extinguished *confusione* where the lands and the annual exigible therefrom become vested in the same person. The general rule is that a burden, which may be extinguished by payment, is necessarily extinguished *confusione* where the same party becomes both debtor and creditor in the right, unless indeed the creditor has an interest to keep it up;⁴ and on principle it would seem that the rule should apply to an annual, which is but a burden on the land. "In the case of a ground annual of this simple character" (*i.e.* where constituted in the old form) "there is a technical difficulty in holding that the ground annual or annuity right can continue to subsist after both the land and the annuity have come to belong to the same person."⁵ It has, however, now been decided that there is no *confusio* in such a case. In *Murray v. Parlane's Trs.*⁶ the annual was held not extinguished, but the decision in that case was based expressly on the intention of the truster. In a later case an opinion was expressed that *confusio* would operate in proper circumstances;⁷ but in *Healy and Young's Tr. v. Mair's Trs.*⁸ the First Division laid it down that a ground annual is not extinguished *confusione*. The decision gives a safe working rule for conveyancing practice and will obviate questions, but the reasoning of the Court is not convincing.

SECTION 9.—ALLOCATION.

1316. As in the case of feu rights, the question of allocation occasionally arises. The position is that, where lands subject to a ground annual are disposed in different lots, each lot remains liable for the whole annual, unless the creditor consents,⁹ or there be a special clause in the original deed of constitution whereby the creditor in the annual

¹ Bell, Convey. ii. 1065.

² Sec. 9 (4) and Schedule E.

³ *Healy and Young's Tr. v. Mair's Trs.*, 1914 S.C. 893, per Lord Skerrington.

⁴ 1890, 18 R. 287.

⁵ 1914 S.C. 893.

⁶ See *Wilson v. Fraser*, 1822, 3 Ross, L.C. 23.

⁷ See *CONFUSIO*, Vol. IV. p. 386, *ante*.

⁸ *King v. Johnston*, 1908 S.C. 684.

⁹ *Thomson v. Scott*, 1828, 6 S. 526.

is bound by an allocation or apportionment when the land is divided. If there is no consent by the creditor, or if there is no such provision in the original deed, the creditor in the annual is not affected by any arrangement for apportionment made without his consent by the proprietor of the land in disposing in various lots of the ground subject to the annual. The creditor's right continues a *unum quid*, but there may be a risk if the apportionment relieves one of the lots *in toto* and the burden does not appear in the titles of that lot. Where the land is divided into lots, "payment of annual rent made by the proprietor of one of the tenements preserves from the negative prescription the whole right of the annual renter, which cannot be weakened by the proprietor making over one of the two in favour of another. But whether such diligence can also hinder the possessor of the other tenement under a singular title from this benefit of the positive prescription may be doubted."¹ Where the creditor agrees to allocate, the proper method is for him, by deed of restriction, to restrict the annual to that part of it which is to affect the particular lot, and to disburden the lot of the balance of the annual. Where, however, a block of ground is given off under an annual, with the intention that it should be subdivided, provision should be made in the deed for apportioning the annual as in the case of feus.

1317. Where an undertaking acquires under the Lands Clauses Consolidation Act a portion of land which is subject to a ground annual, provision is made for the apportionment of the annual. Under s. 107 it is lawful to the promoters to enter upon and continue in possession of the lands subject to an annual without redeeming the annual, provided they pay the same and provided they are not called on to redeem. Sec. 108 makes provision for ascertaining the consideration to be paid for the discharge of the annual, and s. 109 for apportioning the amount if part only of the lands subject thereto is taken. For such apportionment the consent of the parties interested is required.

SECTION 10.—SECURITIES OVER GROUND ANNUALS.

1318. When ground annuals are made the subject of security, the ordinary forms, with the necessary modifications for the constitution, transmission, and discharge of a heritable security by way of infeftment, apply. Where the security subjects in a bond and disposition in security consist of or include one or more ground annuals, the Conveyancing Act of 1924² enables the creditor in the security, provided his title to the debt and security be complete and the debtor be in default in payment of principal or interest, to recover the ground annuals by action equivalent to an action of maills and duties under the Heritable Securities Act of 1894. Before 1924 a decree in an action of

¹ Ersk. iii. 4, 6 ; Stair, ii. 12, 26 ; and see *Lord Balmerino v. Hamilton*, 1671, Mor. 3350, 11234.

² Sec. 26.

maills and duties did not entitle the creditor to uplift ground annuals forming part of his security.

SECTION 11.—ANNUALS FROM ERECTED LORDSHIPS.

1319. Mention may also be made of a kind of ground annual which arises out of church property as affected by the Reformation, and which is rarely met with. At the Reformation the church property was parcelled out in lordships erected by the Crown. To restrain such erections for the future various Acts were passed. In the beginning of the seventeenth century the lords of erection resigned their superiorities to the Crown, with the exception of the feu-duties, which the Crown had power to redeem on payment of a certain consideration. This consideration was never paid, and the power of redemption was renounced in 1707.¹ The feu-duty thus perpetually payable to the successor of a lord of erection is also called a ground annual. The right to this kind of ground annual was generally completed by infeftment.²

¹ 1707, c. 11.

² See Bell's Prin., ss. 885, 886.

GROUND GAME.

See GAME LAWS; LANDLORD AND TENANT.

GUARANTEE (MERCANTILE).

See CAUTIONARY OBLIGATIONS.

GUARDIANSHIP OF INFANTS.

See CUSTODY OF CHILDREN; MINORS AND PUPILS;
TUTORS AND CURATORS.

GUILD.

See CORPORATION; DEAN OF GUILD.

GUN LICENCE.

See EXCISE.

GUNPOWDER.

See EXPLOSIVE SUBSTANCES.

HABIT AND REPUTE.

See CRIME; MARRIAGE.

HABITUAL CRIMINAL.

See CRIME.

HABITUAL DRUNKARD.

See INEBRIATES; JUDICIAL SEPARATION.

HACKNEY COACHMEN.

See CARRIAGE BY LAND.

HALF BLOOD.

See KINSHIP.

HAMESUCKEN.

See CRIME.

HANDWRITING.

See EVIDENCE.

HARBOURS.

See PORTS AND HARBOURS.

HARES.

See GAME LAWS.

HASP AND STAPLE.

See BURGAGE.

HAT-MONEY.

See CARRIAGE BY SEA.

HAVERS.

See CITATION; COMMISSION AND DILIGENCE; OATH
ON REFERENCE.

HAWKER.

See EXCISE; VAGRANT.

HAWKING.

See CRIME.

HEALTH, PUBLIC.

See PUBLIC HEALTH.

HEARSAY EVIDENCE.

See EVIDENCE.

HEIR.

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SECTION I.—DEFINITIONS.

1320. This term is used, in its widest sense, to denote one who takes by succession, *i.e.* from an ancestor, as contrasted with a “singular successor” being one who takes from an author, in virtue of a direct conveyance, whether *inter vivos* or *mortis causa*. In this sense it includes the successor in moveables as well as the successor in heritage. Its precise significance thus depends on the quality of the succession as heritable or moveable. Thus a destination of mixed estate to heirs will, in the absence of anything to shew that another meaning is intended, carry heritage to heirs proper, and moveables to executors.¹ In a narrower sense, “heir” is used to denote the person entitled to succeed to the deceased’s heritage, as distinguished from his executors or heirs in moveables, and includes both the heir-at-law who succeeds *provisione legis*, by force of law, and the heir of provision who succeeds *provisione hominis*, by virtue of a special destination in the titles.

1321. An apparent heir is one who (if he survives) will succeed to estate on the death of its existing possessor. “Heir-apparent” meant one who after the opening of a succession in his favour had not completed title.² An heir presumptive is one whose succession may be prevented by the birth of a nearer of kin to the present owner.

1322. Where the heir-at-law of the last proprietor succeeds to his property in another character, he is *alioqui* (or, *alioquin*) *successurus*.

GENERAL AUTHORITIES.—Stair, Inst. iii. 4 and 5; Ersk. Inst. iii. 8, 1–100; Bankt. Inst. iii. 4 and 5; Bell’s Prin., ss. 1637 *et seq.*; More, Notes on Stair, cccix. *et seq.*; Sandford on Succession; Sandford, Entails; M’Laren, Wills and Succession.

¹ *Blair v. Blair*, 1849, 12 D. 97; *Mitchell’s Trs. v. Waddell, etc.*, 1872, 11 M. 206; see also *Grant’s Trs. v. Grant, etc.*, 1862, 24 D. 1211.

² See APPARENT HEIR, Vol. I. p. 377, *ante*.

If he takes the succession as the heir-at-law of the last proprietor, he incurs responsibility for the debts of his ancestor, at least to the extent of the succession.¹ Where, however, he is *alioqui successurus*, he takes the succession free from responsibility for the debts of the last proprietor. Thus, in the ordinary instance of son succeeding father in an entailed estate, the son makes up his title as heir under the entail, and not as heir-at-law of his father, and thus incurs no liability for his father's debts, beyond those authorised by the deed of entail to be charged on the estate, and actually so charged. On the other hand, creditors in debts contracted by an heir-at-law in possession of an entailed estate, before he has recorded his title as heir of entail, can use diligence against the entailed estate.² In all cases where the heir-at-law of the last proprietor is *alioqui successurus*, the extent of his liability for his ancestor's debts is defined by the title under which he elects to take the property.

SECTION 2.—CONDITIONAL INSTITUTION OF HEIRS.

1323. Where a bequest is made to a person named and his heirs, the general rule is that the bequest does not lapse by the predecease of the legatee. "That rule is, however, not without exception."³ On the *ratio* of the decisions, it appears that a bequest to A., in the event of his surviving the testator, and to A.'s heirs and assignees will lapse if A. predeceases the testator; but in each case regard has been paid to the circumstances and the expressed intention of the testator. These factors may also determine the date at which heirs conditionally instituted are ascertainable.⁴

SECTION 3.—INTESTATE SUCCESSION.

SUBSECTION (1).—Order of Succession.

1324. The "heir-at-law" is the person entitled to succeed *ab intestato* to heritage held by the deceased under a conveyance or destination to himself, or to himself and his heirs. Other terms practically synonymous are "heir of line," "heir general," "heir whomsoever." He succeeds to all heritable estate belonging to the deceased at his death, except such as (a) were held under titles containing a special destination, or (b) may have been disposed of *mortis causa*. The heir-at-law cannot be excluded from the succession except by a conveyance or destination to someone else. Apart from such conveyance or destination, the declaration by the deceased that his heir is disinherited is ineffectual.⁵

¹ 37 & 38 Vict. c. 94, s. 12.

² *Ross v. Drummonds*, 1836, 3 D. 698.

³ *Baillie's Exr. v. Baillie*, 1899, 1 F. 974, per Lord Trayner at p. 976; cf. *Findlay v. Mackenzie*, 1875, 2 R. 909; *Halliburton v. Halliburton*, 1884, 11 R. 979; *Clelland v. Allan*, 1891, 18 R. 377; see *Bowman v. Bowman*, 1899, 1 F. (H.L.) 69.

⁴ *Wylie's Trs. v. Bruce*, 1919 S.C. 211, and cases *ibi cit.*

⁵ *Ross v. Ross*, 1770, Mor. 5019; *Blackwood v. Dykes*, 1833, 11 S. 443; cf. *M'Caig v. University of Glasgow*, 1907 S.C. 231.

While, however, a conveyance to A. entitles his heir to succeed on his death, yet (except in the case of a conveyance by a parent to a child, when the grandchild is entitled to serve under the *conditio si institutus sine liberis decesserit*) where the conveyance is to A., whom failing, to B., A.'s heir-at-law is excluded by B., who is entitled to serve as heir of provision to A., if he has not altered the destination either *inter vivos* or *mortis causa*.

1325. The main features of intestate succession to heritable estate are: (1) primogeniture among males, (2) the succession of males in preference to females, and (3) the right of representation in virtue of which a descendant, however distant, takes the estate to which his ancestor would have succeeded had he survived the deceased. All through the order of succession legitimate relationship is alone regarded.

1326. Subject to these rules, the succession opens first to descendants. If a father dies survived by children, but by no more remote descendants, the succession opens to his eldest surviving son, or if there be no son, to all the daughters equally as "heirs-portioners." But the descendants, in their order, of an elder son predeceasing are preferred to younger children, sons or daughters, surviving. Each *stirps* must be exhausted before the succession opens to the next. In the event of the succession opening to heirs-portioners, the descendants, in their order, of a daughter predeceasing take the share to which she would have succeeded had she survived. It is immaterial whether the deceased's children are of one or several marriages. All heirs who are descendants are known as "heirs of the body."

1327. In the event of there being no descendant, the succession opens to collaterals—brothers and sisters—of the deceased. The heir in this case is the immediate younger brother, or, if he have predeceased, the heir of his body. Failing such younger brother and his descendants, the succession opens to the next younger brother, and so on. If there be no younger brothers or descendants of younger brothers, the succession opens to the immediate elder brother of the deceased; failing him and his descendants, to the next elder brother, and so on. Failing brothers or their descendants, the succession opens to the sisters equally as heirs-portioners, the heir of the body of any predeceasing sister taking in her room. If, however, the brothers and sisters of the deceased be of different marriages, those of the full blood, brothers and sisters german, succeed before those born of a different mother from the deceased, brothers and sisters consanguinean. Brothers and sisters by the same mother but by a different father, known as brothers and sisters uterine, have no right of succession.

1328. Failing descendants, and brothers and sisters german or consanguinean and their issue, the heir is the deceased's father; failing him, his collateral heirs in the order above explained. Failing all these, the succession opens to the deceased's paternal grandfather, and so on. Among ascendants there was the same distinction between heirs of line and heirs of conquest as in the case of collateral succession. The

succession of ascendants was not recognised until after the institution of the Court of Session.¹ Neither the deceased's mother as such, nor any person related through her, can succeed as heir-at-law. His widow, however, has, in addition to terce, an interest in heritage, in cases to which the Intestate Husband's Estate (Scotland) Act, 1911,² is applicable.

SUBSECTION (2).—*Conquest.*

1329. Among collaterals there was formerly a different order of succession with regard to heritable estate which the deceased had acquired by purchase or other singular title, known as "conquest," as distinguished from that to which he had or might have succeeded as heir, known as "heritage." The rules above given applied to heritage. The difference was that whereas heritage descended, conquest ascended, or, in other words, instead of going to younger brothers first, went to elder brothers in their order, beginning with the deceased's immediate elder brother. Failing elder brothers and their descendants, it went to younger brothers in their order in the same way as heritage. It was thus only where the deceased was a middle brother that the order of succession in conquest differed from that in heritage. In all other respects the rules regulating succession were the same. Where one took a conveyance of lands in favour of himself and his heirs, this meant heirs of conquest, not heirs-at-law. Conquest, however, did not include all heritable property acquired by the deceased by singular title, but only such as required sasine to complete the right. Thus it did not include leases or personal bonds excluding executors, nor teinds, unless purchased along with the lands.³ Moreover, conquest, after it had once been taken by succession, became heritage. Thus, assume the third of four brothers to have purchased an estate, and to have died childless and intestate. The second brother, therefore, succeeded as heir of conquest. On his death, childless and intestate, the estate would, if he had made up his title to it, pass to the youngest brother, as his heir-at-law, not to the eldest, as his heir of conquest. If, however, the second brother had failed to make up a title, the eldest would on his death have been entitled to serve as heir of conquest to the third, and take up the estate as being still in his *hæreditas jacens*. The distinction between heritage and conquest is now abolished⁴ as to all successions opening after 1st October 1874, the rules applicable to heritage obtaining in all cases of succession to persons dying on or after that day.⁵

SUBSECTION (3).—*When Heir is Ascertained.*

1330. A rule applicable to all the foregoing cases is that at common law the character of heir is to be ascertained as at the date of the service

¹ *Grant v. Grant's Trs.*, 1859, 22 D. 53, per Lord Curriehill, p. 70.

² 1 & 2 Geo. V. c. 10.

³ Bell's Prin., 10th ed., s. 1672.

⁴ 37 & 38 Vict. c. 94, s. 37.

⁵ See CONQUEST, Vol. IV. p. 400, *ante*.

to the deceased, subject only to this qualification, that a nearer heir then *in utero* is considered as already born, and thus excludes from service the person for the time being holding the character of heir. If service be delayed until after the birth of a nearer heir, there is no doubt (at least as the law stood prior to 1st October 1874) that the nearer heir will be preferred. But the mere possibility of a nearer heir not then *in utero* being afterwards born is no bar to service by the person for the time possessing the character of heir. It was, however, at one time doubtful whether the heir thus serving, at least if an ascendant, was not bound to denude on the birth of a nearer heir. Stair¹ and Bankton² indeed laid it down that he was not bound to denude, but some later writers maintained that he was. The question was therefore an open one until the ascendant's indefeasible right was affirmed by the Court.³ The principle of the decision is perhaps not very clear, but it is thought that, in spite of Lord Curriehill's very powerful dissent in that case, the question can no longer be regarded as open. As will be seen, a different principle applies in tailzied succession. Even although there be a nearer heir *in utero* at the date of service, it is not void, but only voidable.⁴ Prior to 1st October 1874 a right of succession did not vest by mere survivance; and if the person possessing the character of heir failed during his lifetime to take the necessary steps, by making up his title, to vest the right, it fell on his death. But since 1st October 1874 rights of succession vest without service.⁵ It is thought, therefore, that the person possessing the character of heir at the date when the succession opened, could not now, although he had failed to serve, be deprived of the succession by the birth of a nearer heir not then *in utero*.

SUBSECTION (4).—*The Crown as Ultimus Hæres.*

1331. Failing all heirs, the estate falls to the Crown. But the Crown, although described as *ultimus hæres*, does not, it is thought, take as heir, but in respect of the estate being caducuiary. Thus it has been decided that the Crown cannot take under a destination to "heirs" of the deceased.⁶ So the Crown never was liable for the deceased's debts *ultra valorem* of the estate.⁷

SUBSECTION (5).—*Heirs-Portioners.*

1332. Although in early times females were entirely excluded from succession to land, probably because they were deemed unable to render military service, it has long been the law that they succeed, failing males equally near the deceased, according to the usual order of heritable succession, and their descendants. But in the succession

¹ Inst. iii. 5, 50. ² Inst. iii. 5, 56.

⁴ *Wat v. Forrest*, 1706, Mor. 14901.

⁶ *Torrie v. Munsie*, 1832, 10 S. 597.

³ *Grant v. Grant's Trs.*, 1859, 22 D. 53.

⁵ 37 & 38 Vict. c. 94, s. 37.

⁷ Ersk. Inst. iii. 10, 4.

of females there is this peculiarity, that in place of the whole estate going to one, all females equally near in the order of succession inherit in equal portions. Hence the designation "heirs-portioners." Conquest divided equally as well as heritage.¹ Thus if a father die, leaving no sons or their descendants, his daughters, although of different marriages, inherit equally. If any of the daughters have predeceased their father, leaving issue, the issue inherit the share to which their mother would have succeeded had she survived, the sons taking in their order of seniority; and failing them, the daughters equally. In collateral succession the rule is the same. Although females thus succeed equally, they do not hold as joint proprietors. They indeed "hold *pro indiviso* until the subject is divided. Yet each has a title in herself to her own part or share, which she may alienate or burden by her own separate act."²

1333. While division is the leading rule in the succession of females, the right of primogeniture to some extent prevails. Thus (1) where part of the inheritance is *sua natura* indivisible, it goes to the eldest daughter, *e.g.* a title of dignity, or a right of superiority. The vassal could not have superiors multiplied upon him, and he was entitled to take an entry from the eldest daughter alone.³ If the superiority be blench, the eldest daughter takes it with its casualties, without recompense to the others;⁴ but if it yields substantial feu-duties, they must be equally divided.⁵ If there be more than one such superiority, the sisters are entitled to choose them in their order of seniority, recompensing any one who does not receive a superiority.⁶ The eldest sister is also entitled to the custody of the title-deeds.⁷ Again, on the same principle, because it is indivisible, the eldest daughter is entitled (2) to the principal mansion-house as a *præcipuum*. In early times the younger daughters had to be recompensed out of the deceased's estate for the value of the mansion-house. It is, however, now settled that the eldest daughter takes without recompense.⁸ According to Stair⁹ this rule only applies where the mansion-house is a tower, fortalice, etc., but not where it is within burgh, or an ordinary country house. In accordance with this opinion, it has been decided that a house within burgh does not fall to the eldest daughter as a *præcipuum*;¹⁰ nor does a villa on feuing ground.¹¹ But it is sufficient that the house, although not a fortalice or tower, be treated as a mansion-house¹²—although the estate is very small and the house ruinous. Where, however, the house

¹ *Carse v. Russel*, 1717, Mor. 14873.

² *Cargill v. Muir*, 1837, 15 S. 408, per Lord Moncreiff at p. 409.

³ *Fenton v. Heritrix of Dirleton*, 1523, Mor. 5357.

⁴ *M'Neight v. Lockhart*, 1843, 6 D. 128.

⁵ *Rae v. Rae*, 1809, Hume, 764.

⁶ *Houston v. Dunbar and Anr.*, 1744, Mor. 5369.

⁷ *Lady Cunningham v. Lady Cardross*, 1680, Mor. 2449; *Rae v. Rae*, *supra*.

⁸ *Cowie v. Younger Heirs*, 1707, Mor. 5362; *Peadie v. Peadies*, 1743, Mor. 5367; *Ireland v. Govan*, 1765, Mor. 5373; *Forbes v. Forbes*, 1774, Mor. 5378.

⁹ Inst. iii. 5, 11.

¹⁰ *Wallace v. Wallace*, 1758, Mor. 5371; *Smith v. Wilson and Ors.*, 1792, Mor. 5381.

¹¹ *Smith v. Wilson and Ors.*, *supra*; *Rae v. Rae*, *supra*.

¹² *Cowie v. Younger Heirs*, *supra*; *Ireland v. Govan*, *supra*.

was the only one on the estate, and had always been let as a farmhouse, the claim to it as a *præcipuum* was repelled.¹ It is immaterial that the house is in fact divisible, and has been inhabited by two families.² With the mansion-house is included an orchard or garden if unlet, or let with the mansion-house.³ Ornamental grazing parks which enhanced the beauty and privacy of a mansion-house, but had at times been let separately, have been held not to form part of the *præcipuum*.⁴ But where the daughters take in virtue of a destination to them *nominatim*, the eldest has no right to a *præcipuum*,⁵ her right being only that of a joint-dispensee. Where, however, the succession opens to the daughters under a destination to "heirs whatsoever," the eldest is entitled to a *præcipuum*, because "it is left solely to the law to find out who these are."⁶ It does not affect the eldest daughter's right to a *præcipuum* that the heirs-portioners take under an entail which has not been feudalised.⁷ In the division of an estate, the eldest daughter is entitled to the portion lying contiguous to the mansion-house: the others cast lots.⁸

1334. The opinion has been expressed that a lease to a tenant and the heirs of his body, "secluding heirs-portioners," descends to the eldest daughter.⁹ The eldest heir-portioner had no right to heirship moveables.¹⁰ Where an entail fails to exclude heirs-portioners, they take in fee-simple on the succession opening to them.¹¹

1335. Each heir-portioner is primarily liable only for her proportion of the ancestor's debts, although her share of his estate should exceed the whole debt.¹² If the others prove insolvent, she may, as *lucrata*, be found liable to the full extent of the estate to which she has succeeded,¹³ but no further.¹⁴ Under s. 12 of the Conveyancing (Scotland) Act, 1874,¹⁵ the liability of an heir-portioner for her ancestor's debts is now limited to the value of the share of his estate to which she has succeeded.

SECTION 4.—TAILZIED SUCCESSION—HEIRS OF PROVISION.

SUBSECTION (1).—*Classes of Provision.*

1336. Where the heir does not take simply by operation of the law, but in virtue of a destination contained in the titles, he is known as an

¹ *Halbert v. Bogie*, 1857, 19 D. 762.

² *Forbes v. Forbes*, 1774, Mor. 5378.

³ *Cowie v. Younger Heirs*, 1707, Mor. 5362; *Forbes v. Forbes*, *supra*; *Dinniston, etc. v. Welsh*, 1830, 8 S. 935.

⁵ *Cathcart v. Rocheid*, 1773, Mor. 5375.

⁶ *Wight v. Inglis*, 1798, Mor. App. "Heir-Portioner," No. 1; *Maclauchlane*, 1807, Mor. App. "Heir-Portioner," No. 3.

⁷ *Dinniston, etc. v. Welsh*, 1830, 8 S. 935.

⁸ *Callander v. Harvey*, 1916 S.C. 420.

⁹ *Pratt v. Abercromby*, 1858, 21 D. 19.

¹⁰ *Cruickshanks v. Cruickshanks*, 1801, Mor. App. "Heir-Portioner," No. 2; *Rae v. Rae*, 1809, Hume, 764.

¹¹ See *ENTAIL*, Vol. VI. p. 195, *ante*.

¹² *Stair*, Inst. iii. 5, 14; *Ersk. Inst.* iii. 8, 50; *Home v. Home*, 1632, Mor. 14678.

¹³ *Burnet v. Lepers*, 1665, Mor. 5863.

¹⁴ *Stair*, Inst. iii. 5, 14; *Ersk. Inst.* iii. 8, 53; *White v. Hay*, 1698, Mor. 14683; see *re heirs-portioners generally*, *Bell's Prin.* ss. 859, 1083–1085, 1219, 1659; *Bankt. Inst.* iii. 5, 71–84.

¹⁵ 37 & 38 Vict. c. 94.

heir of tailzie or provision. In the language of our institutional writers, every deed which has the effect of diverting the succession from the legal order is called a tailzie or entail. Of these there were three kinds,¹ (1) simple destinations, *i.e.* such as a conveyance to A., whom failing, to B., whom failing, to C.; (2) entails with prohibitory clauses; and (3) strict entails, where the prohibitory clauses were guarded by irritant and resolute clauses. These three classes of entails differed materially in the restraints which they put upon the heir in possession. Under the first class he might (subject to the right of challenge which the heir formerly had on the ground of deathbed) freely alter the destination by conveying the lands either *inter vivos* or *mortis causa* to another series of heirs. But if he did not alter the destination, it would, on his death, entitle the next substitute heir of provision to take the estate in preference to his heir-at-law. Under the second class the heir was put under greater or less restraint, according to the rigour of the prohibitory clauses. They might strike against altering the order of succession, or against contracting debt, or against alienating the lands, or against all of these. So far as the prohibition did not in terms apply, the heir was left quite unfettered, "for restraints are not to be multiplied by implication." But a substitute heir was entitled to prevent or to reduce gratuitous alterations of the succession, or other infringements of express prohibitions.² These unfenced prohibitions were, however, unavailing against the onerous dispositions or obligations of the heir in possession.³ Entails of this class were therefore effectual only *inter hæredes*. Now, however, they are ineffectual even *inter hæredes*.⁴ They are thus merely simple destinations, which may be altered by any form of will habile to regulate the succession to landed estate, provided it purports to do so.⁵

SUBSECTION (2).—Classes of Substitute Heirs.

1337. In destinations it is usual to call classes of substitute heirs by their relation to individuals called *nominatim* as the head of *stirpes* under the description of heirs-male, heirs-male of the body, etc., of such individuals. Heir-male means that heir ascertained according to the usual rules of intestate succession who, being himself a male, is connected with the deceased exclusively through males. Heir of the body means the heir being a lineal descendant of the ancestor. Heir of a marriage means the heir descended of the marriage in question. Heir-male of the body means an heir-male lineally descended from the ancestor. Heir-male of line meant the heir-male excluding the heir of

¹ Ersk. Inst. iii. 8, 22.

² *E. Callander v. Lord John Hamilton*, 1686, Mor. 15476.

³ *Young v. Bothwells*, 1705, Mor. 15482; *Bryson v. Chapman and Anr.*, 1760, Mor. 15511; *Lord Ankerville v. Saunders*, 1787, Mor. 7010.

⁴ 11 & 12 Vict. c. 36, s. 43; *Cunyngham v. Cunyngham*, 1852, 14 D. 636; *Dewar v. Dewar*, 1852, 14 D. 1062; *Ferguson v. Ferguson*, 1852, 15 D. 19.

⁵ 31 & 32 Vict. c. 101, s. 20; see *ENTAIL*, Vol. VI. p. 195, ante.

conquest.¹ Heir-female means the heir of line after exhaustion of heirs-male. This may either be a female or a male succeeding through a female. Where females only remain to take under a destination to "heirs-female," those descended from the sons must succeed in their order. Thus a daughter of the eldest son will succeed to a grandson by a younger son in preference to his sister.² So, on the succession opening to heirs-female, a descendant of the only daughter of the eldest son is preferred to the descendant of a granddaughter of a younger son, although more closely related to the last heir-male.³ It has been decided that in a tailzied destination to "the eldest dochter of A. without division and their heirs-male" the term "eldest dochter" is not synonymous with "heir-female being a female."⁴

1338. If the settlor desires to ensure the estate remaining in his own family, that can only be done by destining it to such a series of heirs as will exclude unrestricted succession through females; for if a female succeed under a destination to heirs, and have children who succeed and die childless, their heir will be some relative on their father's side. Thus the father will be preferred even to a son of the mother by another marriage.⁵

SUBSECTION (3).—*Rules of Construction.*

1339. In complicated destinations difficult questions often arise in determining who is the heir called under the destination. While the primary question always is: What, on construction of his deed as a whole, did the settler mean? there are some general rules of construction to which effect will be given unless the context indicates that they are inapplicable.

1340. Where a substitute heir is described by his position in the family of the settlor, his character will, as a rule, be determined as at the date when the succession opens, not the date when the deed was made. Thus in the *Roxburghe Succession* case,⁶ where the destination was "to the eldest daughter of the said Umquhil Hary Lord Ker without division and their heirs-male," and Lord Hary Ker had four daughters, it was held that the expression "eldest daughter" was not, according to the construction of the deed, to be confined to the eldest born daughter, but was to be considered as applicable to whichever of the four daughters might be eldest when the succession opened, the whole four being by the conception of the deed called *seriatim*. So in a later case⁷ Lord Chancellor Cottenham said: "It appears to me that there is no doubt that the Court is to look, not to those who answered the description of first, second, and so on at the time of the entailer's death, but to those who answered the description at the time the succession

¹ *Sinclair v. Countess and Earl Fife*, 1766, Mor. 14944.

² *Dalrymple and Anr. v. Hope* ("the Bargany case"), 1739, 1 Pat. 237.

³ *Johnstone v. Johnstone*, 1839, 2 D. 73.

⁴ *Lady E. Ker v. Innes, etc.*, 1812, 5 Pat. 579.

⁵ *Lenox v. Linton*, 1663, Mor. 14867.

⁶ *Ker v. Innes, etc.*, 1810, 5 Pat. 320.

⁷ *Shepherd v. Grant*, 1838, 3 S. & M'L. 255, at p. 281.

opened." The words quoted were used with reference to the particular destination there in question, but the reasoning is, it is thought, general. Of course, a contrary intention, if clearly indicated, would receive effect.

1341. While flexible terms may be construed by reference to other parts of the deed, yet technical words will not be lightly understood to have another than their well-accepted meaning. This rule depends on the principle that the will of the settlor governs the succession. But *prima facie* the words used must receive their natural meaning. The settlor will not be lightly presumed to have used them in a different sense. "In construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *prima facie* obvious meaning of those words, unless you are by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain driven out of the obvious meaning, and unless you can satisfy yourself that the author of the deed did not intend that such should be taken to be the meaning of the words he has used, and unless you collect (I think I may safely add that, and I abstain from going further) that that is not the meaning of the language of the author of the deed from what the author of that deed has himself by the deed told you is the meaning of his language."¹ But in considering the settlor's intention it is legitimate to regard the circumstances of the family history as conditioning the words employed.² In accordance with the ordinary rule, the dispositive clause is the controlling one.³ And its terms cannot be affected by inferences drawn from the narrative, or by collateral writings.⁴ But an omission in the dispositive clause may be supplied by reference to the procuratory or precept.⁵

1342. In accordance with the rule, a destination to "heirs-general" will not be interpreted by mere implication to mean "heirs of the body."⁶ On the other hand, it has been held that although there was a destination to the institute and his heirs whomsoever, yet when this was followed by a destination over to take effect on the death of the institute without issue, his heirs whomsoever could not serve to him under the destination, on his death without issue, but the substitute must take, as there was no doubt that that was the settlor's intention.⁷ The principle of these decisions has been stated alternatively, that the latter part of the clause,

¹ *Ker v. Innes, etc.*, 1810, 5 Pat. 320, at p. 444.

² *Ker v. Innes, etc.*, *supra*, *passim*.

³ *Shanks v. Kirk-Session of Ceres*, 1797, Mor. 4295; *Grahame v. Grahame*, 1825, 1 W. & S., 353; *Forrester v. Hutchison*, 1826, 4 S. 824 (N.E. 831).

⁴ *Campbell v. Campbells*, 1770, Mor. 14949; *Hay v. Hay*, 1789, 3 Pat. 142; *Earl of Selkirk v. Duke of Hamilton*, 1740, 1 Pat. 271.

⁵ *Sutherland v. Sinclairs and Anr.*, 1801, Mor. App. "Tailzie," No. 8; *Halliday v. Maxwell, etc.*, 1802, 4 Pat. 346; *Maclauchlan v. Campbell*, 1757, Mor. 2312.

⁶ *Chatto v. Baillie*, 1770, 2 Pat. 243 (reversing C. of S., 1766, Mor. 14941); *Murray v. Flint*, 1774, Mor. 14952; *Sutties v. Sutties*, 19th January 1809, F.C.; *Richardson v. Hay*, 1824, 2 Sh. App. 149; *Duff v. Duff*, 1824, 3 S. 11 (N.E. 9); *Gordon v. Gordon's Trs.*, 1866, 4 M. 501.

⁷ *Tinnock v. M'Lewnan*, 26th November 1817, F.C.; *Moodie or Anderson v. Anderson*, 1829, 7 S. 743; *Hunter v. Nisbett*, 1839, 2 D. 16; *M'Ewan v. Pattison*, 1865, 3 M. 779; *Pattison v. Dunn's Trs.*, 1866, 4 M. 555; *affd.* 1868, 6 M. (H.L.), 147.

if conflicting with the former, must prevail, and that the latter clause is "a mere specification and more precise announcement of what was truly meant by the former."¹ The case² from which Lord Chancellor Eldon's opinion above quoted as to the rigour of the rule is taken, is itself a good illustration of the length the Court will go in arriving by implication at a meaning different from the natural sense of the words. There "heir-male" was held to mean "heir-male of the body" largely because giving the term its ordinary meaning would have had the effect of greatly postponing the substitutes called to the succession; but there were other *indicia* pointing to the same conclusion. The same interpretation was given to "heirs-male";³ while "heirs-female" has been construed as meaning "heirs-female of the body";⁴ and "heirs whatsoever" as meaning "heirs whatsoever of the body."⁵

1343. The following rules have been given as to the circumstances in which technical words admit of construction:—

- "(a) When the words as they stand, taken in their natural sense, render the whole deed unintelligible or inextricable.
- "(b) Where the meaning of the words as they stand is doubtful from the nature of the words themselves.
- "(c) When the natural and legal meaning of the terms is controlled and explained by what appears from the parts of the same deed to be the meaning which the maker of the deed attached to the terms used by him."⁶

These rules are illustrated by the cases above cited.

1344. It has been stated:⁷ "In every case where there has been an antecedent destination of a subject limiting the succession to a particular order of heirs, the general word 'heir,' or 'heir whatsoever,' in all posterior settlements of the subject must be understood, not of the heir-at-law, but of the heir of the former investiture,⁸ unless it shall appear from pregnant circumstances that that term was understood to be used in its proper sense." This rule was supposed to be established by the two old cases cited in support of it, but these, as has been pointed out,⁹ were misunderstood by the learned author. It is now settled that the word "heir" cannot be construed by reference to the former investiture, but, subject to the exceptions above and after explained, must receive its proper legal meaning.¹⁰ Reference must be made, however, to another case where, under somewhat special circumstances, a disposition by a father to his eldest son and his heirs of part of a family estate destined to heirs-male was held to carry the estate to the heirs-male succeeding under the old investiture.¹¹

¹ *Campbell's Trs. v. Campbell*, 1838, 16 S. 1004, per Lord Jeffrey, at p. 1006.

² *Ker v. Innes, etc.*, 1810, 5 Pat. 320.

³ *Braid v. Waddell*, 1860, 22 D. 433.

⁴ *Connell v. Grierson*, 1867, 5 M. 379.

⁵ *Earl of Northesk*, 1882, 10 R. 77.

⁶ Sandford, Entails, p. 91.

⁷ Ersk. Inst. iii. 8, 47.

⁸ *Hay v. Crawford*, 1698, Mor. 14899; *Marquis of Clydesdale v. Earl of Dundonald*, 1727, Mor. 14930.

⁹ Sandford, Entails, p. 80, note.

¹⁰ *Brodies v. Brodie*, 1749, 5 Bro. Supp. 466; *Rose v. Rose*, 1784, Mor. 14955; *Molle v. Riddell*, 1816, 6 Pat. 168.

¹¹ *Burnet v. Burnets*, 1766, Mor. 14941.

1345. Where the subject purchased is an accessory to subjects already held by the purchaser under a destination,—as, for instance, teinds, or the *dominium utile* where the superior is the purchaser—the word “heirs” occurring in the disposition of the accessory subject will be construed as meaning the heirs pointed out in the destination of the principal subject, because of the strong presumption that the purchaser intended the accessory subject to go along with the principal.¹ The principle underlying this rule is curiously illustrated by the case of *Hay*.² There one who held a tack of teinds destined to heirs-male granted a sub-tack taking the rent payable to himself and his heirs whatsoever. On his death the heir-male was preferred to the tack duties.

1346. The case hitherto considered has been that of proper succession in the character of heir. But the case frequently occurs of a testator bequeathing certain lands, or appointing his trustees to convey them, to a person described as the heir-male, heir-male of the body, etc., of some person named. In such a case the beneficiary will be determined according to the meaning of the words by which he is described as above explained. But he completes his title, not in the character of heir, but as dispositive. Consequently service was not, even prior to 1874, required to vest the right in him. So, too, he did not incur the passive title of heir with its attending liabilities. It may also be noticed under this head that a person called as a substitute under a destination may, by the predecease of the institute before any right vested in him, acquire the character of conditional institute. There was formerly much difficulty and some apparent fluctuation of opinion as to how such a person made up titles.³ Now, however, it is quite settled that the person so succeeding takes in the character of institute without any need for service or declarator to vest or establish his right.⁴ The cases last cited conclusively establish the rule that a substitution implies a conditional institution in the event of the institute predeceasing the granter.

1347. As has been seen, in the case of intestate succession, if the person possessing the character of nearest heir at the time complete his title to the estate, the title so made up is indefeasible although a nearer heir should afterwards be born. In testate succession the rule is different. The principle is that the will of the testator must prevail, and that the order of succession which he has prescribed must receive effect. The Court, indeed, in the earliest reported case decided that the person then possessing the character of heir could not serve, as there was hope of a nearer heir.⁵ In a later case the remoter heir

¹ *Stair*, Inst. iii. 5, 12; *Ersk.* Inst. iii. 8, 47; *Bankt.* Inst. iii. 5, 27; *Hay v. Crawford*, 1698, Mor. 14899; *Greenock v. Greenock*, 1736, Mor. 5612; *Duke of Hamilton v. Earl of Selkirk*, 1740, Mor. 14935; *Burnet v. Burnet*, 1766, 2 Pat. 122; *Duke of Roxburghe v. Wauchope*, 1823, 2 S. 141 (N.E. 130).

² *Hay v. Crawford*, *supra*.

³ *Creditors of Carleton v. Gordon*, 1748, Mor. 14366; *Campbell v. Campbells*, 1770, Mor. 14949; *Peacock v. Glen*, 1826, 4 S. 742 (N.E. 749); *Murray v. Murray*, 1833, 11 S. 629.

⁴ *Colquhoun v. Colquhoun*, 1831, 9 S. 911; *Fogo v. Fogo*, 1842, 4 D. 1063; *Grant's Trs. v. Grant* 1862, 24 D. 1211; *Hutchison v. Hutchison*, 1872, 11 M. 229.

⁵ *Bruce v. Melville*, 1677, Mor. 14880.

was allowed to serve; but on a nearer heir being afterwards born, the Court decided that he only held in trust, and was bound to denude in favour of the nearer heir.¹ The question came up again,² when the Court found that upon the birth of the nearer heir the defender's right to the estate resolved and became void, and that the nearer heir had right to the estate from the time of his birth, and might make up titles to the estate as if the defender had never entered. The question was further complicated by the fact that, the estate being much burdened with debt, the heir compelled to denude had sold part of it. The nearer heir endeavoured to reduce the purchaser's title, but the Court granted absolvitor, apparently on the ground that the sale was a necessary act of administration.³ The Court further sustained the validity of a jointure provided by the interim heir during his possession;⁴ but Lord Kames, in his report of the decision,⁵ significantly remarks: "It appeared to me the judges were swayed more by compassion than by law." The jointure may, however, have been supported on the ground that it flowed from a proprietor duly infeft, and could not be affected by the subsequent reduction of his title. Both decisions were affirmed in the House of Lords.⁴ In a modern case⁶ the Court held that the remoter heir had only a qualified interest in the estate, and that a sale made by him before the birth of the nearer heir was ineffectual in respect that, as the investiture disclosed the peculiarity of his possession, the purchaser could not plead *bona fides*. It must always be kept in view, however, that the ruling principle is to carry out the intention of the settlor, and that it may be so expressed as to render the remoter heir's title indefeasible even by the birth of a nearer heir.⁷

SECTION 5.—TITLE OF HEIR.

1348. At common law no right in proper feudal estate vested in the heir, whether at law or of provision, by survivance alone. It was necessary for the vesting of any right that the character of heir should be established, and the estate transferred from the deceased to him. Until this had been done the estate remained *in hæreditate jacente* of the deceased. If the apparent heir died without thus vesting the estate in himself, all his right to it lapsed, and the person who on his death possessed the character of heir of the deceased was entitled to take up the succession.⁸ What sufficed to take the estate out of the *hæreditas jacens* of the deceased, and to vest it in the heir, was determined by (a) the character of the estate or right, and (b) the state of the deceased's title. Thus if the estate was a lease, the heir's right became

¹ *Lord Mountstewart v. Mackenzie*, 1707, Mor. 14903.

² *Mackinnon v. Mackinnon*, 1756, Mor. 14938.

³ *Mackinnon v. M'Donald*, 1765, Mor. 5279.

⁴ *Macdonald v. Mackinnon*, 1765, Mor. 5290.

⁵ Mor. 5285.

⁶ *Stewart v. Nicolson*, 1859, 22 D. 72.

⁷ *Lord Montgomerie v. Earl of Eglinton and Winton*, 1847, 6 Bell's App. 136.

⁸ See APPARENT HEIR, Vol. I. p. 377, *ante*.

complete by the mere fact of his survivance.¹ Originally, indeed, the heir required to serve before he could assign the lease;² but it was afterwards decided that the mere fact of survivance vested the heir with a title to assign the lease.³ Udal lands, too, in Orkney and Shetland vested without service, even although the deceased was infert, if his titles could not be connected with a charter from the Crown.⁴ So corporeal moveables, made heritable by destination, vested without service,⁵ and the right to heirship moveables, provided there had been possession.¹ Heritable bonds, too, where the deceased was not infert, vested in the substitute first named without service;⁶ but a substitute called in the second place, even *nominatim*, required to serve,⁷ a general service being sufficient.⁸ Service was not required to vest the *jus crediti* of heirs under a marriage contract to their provisions, for the reason that they took as creditors, not as heirs.⁹ Lastly, titles of honour and hereditary offices required no service to vest them in the heir.¹

1349. With regard to proper feudal estate, service (or the less formal completion of title by *clare constat* or cognition and sasine) was always necessary to vest the right. If the deceased had only a personal title, a general service sufficed to transfer the unexecuted precept or procuratory upon which the heir might proceed to complete his title to the estate.¹⁰ If, however, the deceased's title was complete, it was formerly necessary not only that the heir's character be established, but that his title be completed by infertment. This might be done in several ways. The most formal method consisted in the heir obtaining himself served as heir in special. After obtaining a decree of special service, he was in a position to force an entry from the superior. If the heir, although served, died before taking infertment, his right lapsed. But by statute¹¹ it was provided that a decree of special service should be equivalent to a disposition by the deceased to the heir, at once vesting in him a personal but transmissible right to the lands. The second and most usual method was for the heir without service to obtain from the superior a precept (now a writ) of *clare constat*, infertment on which completed his title. This precept formerly fell by the death of either granter or grantee; but it is now¹² effectual during the life of the grantee notwithstanding the death of the granter.¹³ The heir might also complete his title by adjudication on a trust bond.¹⁴ In burgage property, the heir might be entered by one of the bailies by cognition and sasine.¹⁵ For further particulars as to these various modes of completing an heir's

¹ Ersk. Inst. iii. 8, 77.

² *Rattray v. Graham*, 1623, Mor. 10366.

³ *Campbell v. Cunninghame*, 1739, Mor. 14375.

⁴ *Beaton v. Gaudie*, 1832, 10 S. 286.

⁵ Bell's Prin., s. 1825.

⁶ *Wilson v. Sellers*, 1757, Mor. 14368.

⁷ Stair, Inst. iii. 5, 6.

⁸ Ersk. Inst. iii. 8, 63.

⁹ Ersk. Inst. iii. 8, 73; *Ogilvy*, 16th December, 1817, F.C.

¹⁰ Bell's Prin., s. 782.

¹¹ 31 & 32 Vict. c. 101, s. 46.

¹² 10 & 11 Vict. c. 48, s. 15; re-enacted 31 & 32 Vict. c. 101, s. 103.

¹³ See COMPLETION OF TITLE, Vol. IV. p. 207, *ante*.

¹⁴ See Adjudication on a Trust Bond, Vol. I. p. 145, para. 366, *ante*.

¹⁵ See BURGAGE, Vol. II. p. 445, *ante*.

title, see COMPLETION OF TITLE.¹ Now a personal right to every estate in land descendible to heirs vests without service or other procedure in the heir entitled to succeed by survivorship of the person to whom he is entitled to succeed, whenever he died,² provided the heir did not die before 1st October 1874; and this personal right may be transferred, like an unfeudalised conveyance. A feudal title in the heir's person can still, however, be completed only by infeftment following on one or other of the preliminary processes before mentioned. It is thought that this statutory provision, vesting a right of succession in an heir without service, would not entitle the superior to insist against an heir, who had not intromitted with an estate, for the feu-duties payable from it.

SECTION 6.—RIGHTS OF HEIRS.

1350. Before completing his title, an heir is entitled to possession of the estate, and to many other rights.³ After completing his title, he is fully vested in all the rights belonging to the deceased descendible to him, and may exercise them as fully as the deceased could have done. He is, as the legal brocard expresses it, *eadem persona cum defuncto*. The congeries of rights thus vested in the heir is known as his "active title." Where the heir is excluded from possession by a liferenter, and has no other means of support, he is entitled to aliment from the liferenter, if the latter have more than is required for his own subsistence.⁴ The heir is also entitled to the moveable succession, if there be no one else as nearly related to the deceased. If there are others as nearly related, he cannot take the heritable succession and at the same time claim a share of the moveables; but he is always entitled to participate in the moveable succession on collating the heritage.⁵ His right to participate in the moveable succession extends, if the heir is a child of the deceased, to the legitim as well as to the dead's part. If the right of the younger children to legitim be discharged or excluded, while the right of the heir is not, he is entitled to the whole legitim fund.⁶ The heir had formerly the right to reduce *ex capite lecti* deeds granted by his ancestor when on deathbed to his prejudice.⁷ He had also in certain circumstances a certain claim to part of the deceased's corporeal moveables. These last two rights are now abolished.

SECTION 7.—LIABILITIES OF HEIRS.

1351. At common law the heir, being *eadem persona cum defuncto*, was liable to fulfil all his ancestor's obligations. This liability was known as his "passive title," and was unlimited in its extent. It did

¹ Vol. IV. p. 207, *ante*. See also Bell, Convey. 1082 *et seq.*

² 37 & 38 Vict. c. 94, s. 9.

³ See APPARENT HEIR, Vol. I. p. 377, *ante*.

⁴ Ersk. Inst. ii. 9, 62, and 63, and cases *ibi cit.*

⁵ See COLLATION, Vol. III. p. 476, *ante*.

⁶ *Earl of Kintore v. Countess Dowager of Kintore, etc.*, 1884, 11 R. 1013; *affd.* 1886, 13 R. (H.L.) 93.

⁷ See DEATHBED, Vol. V. p. 439, *ante*.

not, however, extend to all heirs alike, and the Legislature early provided means whereby it might be limited to the value of the estate inherited. If the heir, without a title, proceeded to intromit with the deceased's estate, he at once, *ipso facto*, incurred the fullest liability. If he wished to avoid this, his duty was to abstain from intromission. The law allowed him a year, afterwards reduced to six months, to make up his mind whether he should assume the rights and responsibilities of heir. Meantime he was entitled, in order to ascertain the value and liabilities of the succession, to compel the exhibition of all writings granted to or by the deceased. This was done by an action of exhibition *ad deliberandum*.¹ While the *annus deliberandi* ran, the heir could not have diligence done against him for the deceased's debts. If he desired to avoid liability, he might do so by renouncing the succession. If, however, the heir-at-law or of conquest expedite a general or special service, his liability was at once fixed for the full amount of the deceased's debts,² if anything was carried by the service.³ Such heirs also incurred universal responsibility if, being duly charged to enter, they appeared and failed within a reasonable time to renounce.⁴ It has been said that the same liability resulted from service as heir-male in general, *i.e.* without reference to any particular estate, because that carried to the heir every right in the ancestor which by former investitures was descendible to heirs-male.⁵

1352. Not every heir incurred universal liability. At common law there was limited responsibility in the following cases:—

(a) An heir of provision taking a particular estate in virtue of a special destination was only liable *in valorem*. A contrary view was at one time entertained.⁶ But it was afterwards settled that the liability was only *in valorem*.⁷ Where an estate is held under strict entail, the heir succeeding to the estate is not, save for provisions to wives and younger children, in so far as authorised by statute, liable to any extent for the obligations of a preceding heir incurred in contravention of the entail.⁸ So far was this principle formerly carried, that the succeeding heir of entail was not even liable to fulfil obligations, unless arising purely from custom,⁹ undertaken by a former heir in leases, to pay tenants the value of meliorations at the end of their leases, or himself to execute improvements on their farms. These obligations, so far as

¹ See APPARENT HEIR, Vol. I. p. 377, *ante*. *re Annus deliberandi*; *beneficium inventarii* and passive title.

² Ersk. Inst. iii. 8, 50.

³ Bell's Prin., s. 1916; *Earl of Fife v. Duff*, 1828, 6 S. 698; *Mackay v. Campbell's Trs.*, 1835, 13 S. 246.

⁴ *Smith v. Oliphant's Exrs.*, 1807, Hume, 439.

⁵ Ersk. Inst. iii. 8, 50; Bell's Prin., s. 1916.

⁶ Stair, Inst. iii. 5, 13; Ersk. Inst. iii. 8, 51.

⁷ Bankt. Inst. iii. 5, 62, and 63; Bell's Prin., s. 1922; *Baird v. Earl of Rosebery*, 1766, Mor. 14019; 5 Bro. Supp. 927.

⁸ *Viscount Stormonth v. Creditors of Annandale*, 1662, Mor. 13994; *Riddoch v. Drummond*, 1682, Mor. 14000; Ersk. Inst. iii. 8, 51.

⁹ *Learmonth v. Sinclair's Trs.*, 1878, 5 R. 548.

unimplemented during the life of the granter, could only be insisted in against his executor.¹ Now, however, unless the heir in possession coming under the obligation has otherwise declared, the succeeding heirs of entail are bound to relieve the executor to the extent to which the heir in possession, had he implemented his obligations to his tenants, might have charged the sums so paid by him on the estate, and also to relieve the executor to the same extent of obligations undertaken by the heir in possession in connection with improvements on the mansion-house and offices, or any parts of the estate not under lease.² But if an heir of entail served not only as heir of tailzie and provision, but as heir of line, or even heir-male, of the preceding heir of entail, he was barred from challenging deeds granted by him in contravention of the entail, because by his service he had rendered himself liable to warrant all his obligations.³

(b) An heir entering by precept of *clare constat* was thought to be universally liable for his ancestor's debts.⁴ But the contrary has been decided where, after his entry, the ancestor's title was reduced.⁵ It is thought that the liability was in all cases limited to the value of the particular estate.⁶

(c) An heir entering *more burgi*—that is, without service by cognition and sasine—was liable only *in valorem*.⁷

(d) An heir taking up a lease of ordinary length destined to heirs, but excluding assignees and sub-tenants, is not liable at all for the ancestor's debts,⁸ because the ancestor's right terminated with his life, and the lease could not be attached by the creditors. If the lease were of extraordinary duration, the heir would probably be liable *in valorem*, on the ground that the exclusion was ineffectual against creditors.

1353. The heir's common-law liability for his ancestor's debts, as above explained, has been progressively modified by Statute. Now it is limited to the value of the estate to which he succeeds.⁹

1354. In addition to his liability for the ancestor's debts, the heir succeeding to his fee-simple estate, or otherwise representing him, is bound to maintain the younger children, if otherwise unprovided for: sons, until majority; daughters, if in the higher ranks of life, beyond that age until marriage.¹⁰ The heir is not thus liable if he succeed to his father under an entail;¹¹ nor when he has succeeded to only

¹ *Dillon v. Campbell*, 1780, Mor. 15432; *Webster v. Farquhar*, 1791, Mor. 15439, Bell's Oct. Cas. 207; *Todd v. Moncreiff & Skene*, 1823, 2 S. 113 (N.E. 104); affd. 1825, 1 W. & S. 217; *Fraser v. Fraser*, 1830, 8 S. 409; affd. 1831, 5 W. & S. 69; *Mackenzie v. Mackenzie*, 1849, 11 D. 596; *Gillespie v. Riddell*, 1909 (H.L.) S.C. 3; *Riddell's Exrs. v. Milligan's Exrs.*, 1909 S.C. 1137; but see 4 & 5 Geo. V. c. 43, ss. 5, 6, and 7; *ENTAIL*, Vol. VI. p. 195, *ante*.

² 41 & 42 Vict. c. 28, ss. 1 and 2.

³ *Home v. Home*, 1708, Mor. 14010; *Ayton v. Ayton*, 1710, Mor. 14010.

⁴ Ersk. Inst. iii. 8, 71.

⁵ Bell's Prin., s. 1922; *Farmer v. Elder*, 1683, Mor. 14003.

⁶ *Baird v. Earl of Rosebery*, 1766, Mor. 14019; *Blount v. Nicolson*, 1783, Mor. 9731.

⁷ *Blount v. Nicolson*, *supra*.

⁸ *Bain v. Mackenzie*, 1896, 23 R. 528.

⁹ 37 & 38 Vict. c. 94, s. 12.

¹⁰ Ersk. Inst. i. 6, 58.

¹¹ *Malcolms v. Malcolm*, 1756, Mor. 439; *Jackson v. Gourlay*, 1836, 15 S. 313.

a trifling estate, and the succession taken by the younger children is fairly equivalent.¹

SECTION 8.—ORDER OF LIABILITY OF HEIRS.

1355. In a question with creditors, and apart from any speciality in the obligation, while the different classes of heirs are all liable, at least to the value of the estate inherited by them, yet they can only be sued in a particular order.²

(a) The heir primarily liable is the heir of line, or heir-general, as being the general representative of the deceased. While the distinction between heritage and conquest existed, the heir of line was liable before the heir of conquest.³ Where more than one heir of line succeeded, as where the first heir died without having made up a title to the whole estate, the obligation divided *pro rata* of the value of the succession taken by them respectively.⁴

(b) The heir of conquest, as general successor in all lands acquired by the deceased by singular title, came next.

(c) Next came heirs of provision, who were only liable after the heirs of line and conquest had been discussed.⁵

1356. But while the liability of the heir of provision was undoubtedly postponed to that of the heirs of line and conquest where there was any estate for them to succeed to, there is some conflict in the decisions on the question whether it was necessary to call such heirs where there was no visible estate for them to succeed to, before suing the heir of provision.⁶ Of the heirs of provision *inter se*, the heir-male, being of the deceased's blood, is liable before the heir of tailzie, where there is estate for him to succeed to.⁷ But where two sons of the deceased succeeded—the eldest to his entailed estate under an entail which contained no prohibition against contracting debt, the second to a fee-simple estate in virtue of a special destination—it was decided that, being both heirs of provision, they must pay their father's personal debt rateably, according to the value of the estates taken by them. The Court disregarded the arguments, on the one side, that the eldest son, being heir of line, was primarily liable, and, on the other side, that the second son was primarily liable, as taking by provision of the father, while the eldest son did not.⁸ Stair⁹ maintained that heirs by marriage

¹ *Mackintosh v. Taylor*, 1868, 7 M. 67; Fraser, Parent and Child, 3rd ed., p. 128.

² Stair, Inst. iii. 5, 17; Ersk. Inst. iii. 8, 52; Bankt. Inst. iii. 5, 69; Bell's Prin., ss. 1935, 1936.

³ *Creditors of Fairly v. His Heirs*, 1630, Mor. 3559; *Brown v. Brown*, 1782, Mor. 5228.

⁴ *White v. White*, 1673, Mor. 5207; *Ker v. Thomson*, 1736, Mor. 5211.

⁵ *Forrester v. Fotheringham*, 1649, 1 Bro. Supp. 429; *Walls v. Maxwell*, 1700, Mor. 3561; *Vint v. Earl of Dalhousie*, 1712, Mor. 3562; *Park's Curator v. Black*, 1871, 9 M. 1078.

⁶ *Cp. Luss v. Earl of Nithsdale*, 1672, Mor. 3565, and *Allan v. Earl of Lauderdale*, 1715, Mor. 3566.

⁷ *Dunbar v. Hay*, 1621, Mor. 3559.

⁸ *Mackenzie v. Mackenzie*, 1847, 9 D. 836.

⁹ Inst. iii. 5, 17.

contract, being heirs by blood, were liable before other heirs of tailzie and provision. This, however, is disputed by other institutional writers, who point out that the heir by marriage contract, being in some degree creditor to the deceased, should come last.¹ Heirs under a strict entail are not liable for the debts of a preceding heir; on the other hand, where a father binds himself by marriage contract to make pecuniary provisions or to destine certain estates to the heir or children of the marriage, they take not in the character of heirs, and do not represent the deceased. As between an heir under an entail which does not effectually preclude the contraction of debt and other heirs of provision, there is, as has already been seen, no priority.² Where the heir of the marriage takes not as heir, but as creditor, the provision payable to him is a good charge against lands held by his father under an imperfect entail.

1357. But the foregoing order of liability among heirs only applies with regard to personal debts or heritable debts unconnected with special subjects, *e.g.* annuities, due by the ancestor dying intestate. Where the ancestor has died testate, his will is the rule; and where the debt is charged on a particular estate, the heir taking it, of whatever class he may be, is primarily liable to the extent of the value of that estate, in virtue of the ancestor's implied will. Thus where the testator has bound himself and his heirs-male, they are liable before the heir of line.³ So where the debt is charged on a particular estate, the heir taking that estate is primarily liable to the extent of the value of the estate, not only in a question with heirs of the same class,⁴ but even in a question with heirs whose liability for general debt is prior to his own.⁵ But if the estate on which the debt is charged be insufficient to meet it, the heir of line is primarily liable for the balance.⁶ On the same principle, where the debt is charged on several estates, the heirs taking them, although of different classes, are liable *pari passu* in proportion to the value of the estates to which they succeed to the extent of their value.⁷ The question, however, always is, What did the ancestor mean? His intention, if clearly expressed, will receive effect.⁸

SECTION 9.—RELIEF BETWEEN HEIR AND EXECUTOR.

1358. In a question between heirs and executors the rule is firmly fixed that, unless the deceased has otherwise directed, the heir is primarily

¹ Bankt. Inst. iii. 5, 69; Ersk. Inst. iii. 8, 52; Bell's Prin., s. 1935.

² *Mackenzie v. Mackenzie*, 1847, 9 D. 836.

³ Ersk. Inst. iii. 8, 52; Bell's Prin., s. 1935; *Blair v. Anderson*, 1663, Mor. 3571.

⁴ *A. Robertson's Crs. v. W. Robertson's Crs.*, 1803, Mor. App. "Competition," No. 2.

⁵ *Fairlie v. Heirs of Blair*, 1611, Mor. 3575; *Gordon v. M'Dowal*, 1615, Mor. 3575; *Ogilvie v. Dundas*, 1826, 2 W. & S. 214; *Carrick's Trs. v. Moore*, 1840, 2 D. 1068.

⁶ *Earl of Kinghorn v. Leslie*, 1607, Mor. 3574.

⁷ *Rose v. Rose*, 1787, 3 Pat. 66; *Sinclair's Exrs. v. Fraser*, 1798, Hume, 176; *Moncreiff v. Skene*, 1825, 1 W. & S., 672.

⁸ *Breadalbane Trs. v. Duchess of Buckingham*, 1842, 4 D. 1259; *Mackintosh v. Mackintosh's Trs.*, 1873, 11 M. (H.L.) 28.

liable for heritable debts, and the executor for moveable debts.¹ The question turns entirely on what was the character of the debt as affecting the ancestor—whether personal or heritable. Thus if the debt be personal, the executor is primarily liable although it arise out of the deceased's obligation to lay out money on land,² or have been incurred by the deceased in improving a landed estate,³ or be payable after the ancestor's death to tenants for meliorations affected by them,⁴ or represent the price of an estate purchased by the ancestor, but retained by him until the seller should clear off burdens affecting it,⁵ or be due under a personal bond as the price of lands purchased by the ancestor at a judicial sale.⁶ The same principle applies, and the executor is primarily liable, where the ancestor has purchased lands and has retained part of the price in order that he may pay debts incurred by the seller and charged on the estate; for although the creditor holds heritable security, the purchaser's obligation is purely personal.⁷ So where the ancestor has granted absolute warrandice in a conveyance of lands, his executor is primarily liable to clear the estate of debt, even although the executor is the grantee of the conveyance.⁸

1359. But where the debt is in the position of a real burden on the ancestor's estate, liability for it falls primarily on the heir. Thus where, in the disposition to the ancestor, the price was declared a real burden, the primary liability fell on the heir, although infestment had not been taken.⁹ The result was the same where the ancestor had purchased an estate charged with debt, retaining its amount from the price and granting a bond of corroboration to the creditor;¹⁰ and also where the purchaser was infest in the property under an absolute disposition, but had granted a back letter to the ancestor, declaring that he had made the purchase for him, and was bound to convey to him on payment of the price.¹¹ It does not affect the heir's liability that the security may be bad in a question with creditors, the ancestor's intention to grant security over the lands being clear; and if the lands burdened be insufficient to pay the debt, the balance will still be regarded as a heritable debt primarily payable by the heir. "The question between heir and executor does not depend upon the bond being found to create an effectual preference in a competition, but, according to all the authorities, upon the intention of the ancestor to create a heritable debt or a moveable debt. There can be no question that the bond was

¹ *Lord Carnousie v. Lord Meldrum*, 1630, Mor. 5204; *Drummond, etc. v. Drummond, etc.*, 1799, 4 Pat. 66; *Wallace v. Ritchie's Trs.*, 1846, 8 D. 1038; *Breadalbane's Trs. v. Jamieson, etc.*, 1873, 11 M. 912; *Duncan, etc.*, 1883, 10 R. 1042; see 4 & 5 Geo. V. c. 43.

² *Mullo v. Mullos*, 1758, Mor. 5221.

³ *Hyslop's Trs. v. Hyslop*, 18th January 1811, F.C.

⁴ *Moncreiff v. Tod*, 1825, 1 W. & S., 217.

⁵ *Macnicol v. Macnicol*, 16th June 1814, F.C.; *Ramsay v. Ramsay*, 1887, 15 R. 25.

⁶ *Arbuthnot v. Arbuthnot*, 1773, Mor. 5225.

⁷ *Lowthian v. Ross*, 1797, 3 Pat. 621; *Macnicol v. Macnicol*, 16th June 1814, F.C.

⁸ *Duchess of Montrose v. Stuart*, 1887, 15 R. (H.L.) 19.

⁹ *Macnicol v. Macalman*, 31st January 1816, F.C.

¹⁰ *Clayton v. Lowthian*, 1826, 2 W. & S. 40.

¹¹ *Murray v. Murray*, 1837, 16 S. 283.

intended to create a heritable debt; and under the Act of 1868 such a debt remains heritable in so far as regards the liability of the debtor and his successors, although it is now moveable *quoad* the succession of the creditor. It appears to me, therefore, that the unpaid balance of the accounts secured or intended to be secured by the bond in question forms a proper charge upon the heritable succession.”¹ An interesting illustration of the rule is afforded by a case in which the testator, being liable under his marriage contract to provide his widow in an annuity, and having executed on deathbed a settlement of his whole estate, directing his trustees to pay, *inter alia*, the annuity out of the proceeds, and the heir having reduced the settlement *quoad* the heritage *ex capite lecti* and served heir, it was held that he must relieve the moveable estate of the annuity, as being in its nature heritable from bearing a tract of future time, to the extent of the value of the heritable property to which he had succeeded, or might yet succeed, as heir in heritage of the deceased.² It has been decided that the liability, as between heir and executor, for debt charged on a Scottish estate falls, in accordance with the law of Scotland, on the heir, although by the law of the deceased’s domicile the executor was primarily liable.³

1360. The rule set forth in the two preceding paragraphs is firmly fixed; and while it will of course yield to the expression of a contrary intention by the ancestor, it will not be displaced by implication unless very clear. “Unless there be—I do not say express words of direction—but unless there be what is called in the House of Lords implication as clear as to amount to declaration plain—so clear implication that there can be no doubt about it—we cannot transpose the burdens upon the two successions.”⁴ Thus, on the one hand, the executor is not bound to pay in relief of the heir heritable debt merely because of a general direction by the testator to pay his debts.⁵ *Fraser’s* case⁶ is a good illustration of the rule, for there the testator directed that “all my just and lawful debts be paid by my executors,” and he left large moveable estate, while his only debt was the heritable debt of which the heir unsuccessfully sought to be relieved. Conversely, the disposition of lands under burden of debts, but where the clause is not so conceived as to make the debts a burden on the lands, does not preclude the person taking them from being relieved of moveable debt by the executor.⁷

1361. Where an heir has had to pay moveable debts, there being at the time supposed to be no moveable estate, he is, should such estate

¹ *Bell’s Tr. v. Bell*, 1884, 12 R. 85, per Lord Kinnear at p. 90.

² *Crawford’s Trs. v. Crawford*, 1867, 5 M. 275.

³ *Drummond, etc. v. Drummond*, 1799, 4 Pat. 66.

⁴ *MacLeod’s Trs.*, 1871, 9 M. 903, per Lord Ardmillan at p. 911.

⁵ *Sinclair’s Exrs. v. Fraser*, 1798, Hume, 176; *Fraser v. Fraser*, 1804, Mor. App. “Heir and Executor,” No. 3; *Campbell v. Campbells*, 1817, Hume, 180; *Henderson v. Hamilton*, 1858, 20 D. 473; *Bain v. Reeves*, 1861, 23 D. 416; *Douglas’s Trs. v. Douglas, etc.*, 1868, 6 M. 223; *MacLeod’s Trs.*, 1871, 9 M. 903.

⁶ *Fraser v. Fraser, supra*.

⁷ *Russels v. Russel*, 1745, Mor. 5211; *Campbells v. Campbell*, 1747, Mor. 5213; *Forbes v. Forbes*, 1766, 1 Hailes 138.

subsequently emerge, entitled to repetition from the executor.¹ So where an heir of line, who had paid debts on the faith that he was heir to an estate, was subsequently evicted by the heir-male, it was decided by the House of Lords, reversing the judgment of the Court of Session, that the heir of line, having succeeded to no estate, was entitled to relief from the heir-male.²

1362. A creditor, however, does not require to consider whether the debt due him is heritable or moveable. Both heir and executor are liable to him, and he may sue either at pleasure.³ It makes no difference that the heir's liability only arises under the Act 1695, c. 24. He cannot on that ground insist on the executor being first discussed.⁴ But the executor is not liable for rents falling due after the ancestor's death, and after the heir has been recognised as tenant.⁵ Nor is he liable for feu-duties becoming due after the ancestor's death, even although the ancestor has by feu-contract bound "himself and his heirs, executors, and successors whomsoever," nor for damages because the heir has failed to take up the feu.⁶ But the executor is liable for such rents or feu-duties where the ancestor has bound himself and his heirs, executors, and successors conjunctly and severally,⁷ and for damages in respect of obligations prestable by the ancestor under his title but not implemented at his death.⁸

SECTION 10.—INTERNATIONAL LAW.

1363. It is beyond the scope of this article to deal with the problems arising through the facts that a Scotsman leaves estate abroad or that his own or his legatee's heirs are instituted as beneficiaries. Reference is made to the undernoted authorities,⁹ in which the question whether the *lex domicilii* or the *lex loci rei sitæ* is applicable has been fully considered.

¹ *Stainton's Trs. v. Dawson*, 1868, 6 M. 240.

² *Maxwell v. Houston*, 1717, Mor. 5210.

³ *Trail v. Jackson*, 1611, Mor. 3563; *Adam v. Gray*, 1626, Mor. 3564; *Carnegie v. Knowes*, 1627, Mor. 3564; *Kirkpatrick v. Douglas*, 1838, 16 S. 608; *affd.* 1841, 2 Rob. 475; *British Linen Co. v. Lord Reay*, 1850, 12 D. 949.

⁴ *Morris v. Beveridge*, 1867, 6 M. 60.

⁵ *Duke of Gordon v. Leslie*, 1791, Mor. 5444.

⁶ *Aiton v. Russell's Exrs.*, 1889, 16 R. 625; *Macrae v. Mackenzie's Tr.*, 1891, 19 R. 138.

⁷ *Police Commissioners of Dundee v. Straton, etc.*, 1884, 11 R. 586; *Burns v. Martin*, 1887, 14 R. (H.L.) 20.

⁸ *Rankine v. Logie Den Land Co.*, 1902, 4 F. 1074.

⁹ *M'Laren, Wills and Succession*, 3rd ed., i. 16 *et seq.*; *Smith's Trs. v. Macpherson*, 1926 S.C. 983.

HEIRLOOMS.

See HEIRSHIP MOVEABLES.

HEIRSHIP MOVEABLES.

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SECTION 1.—DEFINITION.

1364. Heirship moveables¹ were abolished by the Titles to Land Consolidation (Scotland) Act, 1868,² and the interest in the subject can now seldom be more than antiquarian. They consisted of certain articles of a moveable nature to which the heir of line of a person deceased was entitled to succeed in addition to the heritage, and to the exclusion of the executors. The right was established by the Act 1474, c. 54, and was founded upon the presumed intention of the deceased that his heir should not succeed to the bare walls only of his house, or to his farm, dismantled of all its plenishing. The right pertained only to “the heirs of prelates, under whom are comprehended all beneficed persons;³ the heirs of barons, under whom are comprehended all who are infeft in lands⁴ or annualrents,⁵ though not erected in a barony; and the heirs of burgesses, by whom are meant actual trading, but not honorary, burgesses.”⁶

SECTION 2.—WHO COULD CLAIM.

1365. The heir of line alone could claim heirship moveables, and he could do this though he actually succeeded to no heritable property.⁷ In the case of heirs-portioners of line, the eldest succeeded to the heirship moveables.⁸ Where the heir renounced the succession, the heirship moveables went to the executors.⁹ Heirship moveables vested by possession without service; but if the heir died without obtaining possession, they went to the heir of the first deceased.¹⁰

SECTION 3.—EXTENT OF RIGHT.

1366. A heritable bond, without infeftment thereon, did not give the right to heirship moveables;¹¹ nor did the possession by the deceased

¹ See Stair, iii. 5, 9; Ersk. iii. 8, 17, and 18.

² 31 & 32 Vict. c. 101, s. 160.

³ *Rigg v. M'Kenzie*, 1623, Mor. 5391.

⁴ See *Irvine v. Irvine*, 1744, Mor. 2304 and 5400.

⁵ *Jameson v. Waugh*, 1678, Mor. 5398.

⁶ *Dunbar v. Leslie*, 1628, Mor. 5392; *Cumming v. Cumming*, 1698, Mor. 5399; Hope, Minor Practicks, App. II.

⁷ *Crawford v. Crawford*, 1543, Mor. 5389.

⁸ *Garnkirk's Exrs. v. Gray*, 1725, Mor. 5366.

⁹ *Pollock v. Pollock*, 1667, Mor. 5402.

¹⁰ Ersk. iii. 8, 77.

¹¹ *Montgomery v. Stuart*, 1666, Mor. 5396; *Cochran v. Duchess of Hamilton*, 1695, Mor. 5398; *Cumming, supra*.

of a liferent,¹ or a conjunct fee.² Where the deceased had been divested before death, no heirship moveables could be claimed.³

1367. The Act of 1474 provided that, "anent the airship of mooveable gudes," the heirs shall have "the best of ilk a thing, and after the Statute of the Burrow Lawes, and as is contened in the Samin." The "Burrow Lawes" here referred to give a list of articles which might be claimed as heirship moveables,⁴ and lists are also given in Hope's Minor Practicks⁵ and Balfour's Practicks.⁶ These lists, however, can scarcely be taken as exhaustive. The heir was entitled to take "the best buird and buird claith, ane hand towel," and so on, through all the articles of household furniture, silver-plate, linen, etc. Where the articles were such as went in pairs or dozens, he might take the best pair or dozen. "Gif thair be twelf spoonis, or ma, the air sall have twelf; bot gif thair be fewar nor twelf, the air sall have bot ane."⁶ Of "divers and sindrie tapestries" or "pavilions," he might only take the best.⁷ But by ancient custom he was entitled to the whole furniture of the hall,⁸ and also to such articles as the family seal of arms, and the cushion and carpet of the seat in church. In a modern case it was held that a silver cup presented to the deceased by a regiment of foot was an heirship moveable, but that a cabinet of coins and the books relating thereto could not be claimed as heirship.⁹ The heir was not entitled to draw heirship from articles of a fungible nature, or such as were estimated by quantity, *e.g.* money, wine, or corn. From the outside plenishing he might take the best horse, yoke of oxen, cow, cart, plough, etc. Where an heir claimed a bull in addition to a yoke of oxen and a cow, his claim was disallowed. In the same case he was refused more than one horse.¹⁰ No ship or boat could be claimed as heirship.¹¹

1368. The heirship was drawn from the whole moveables of the deceased before any division by law or paction took place.¹² The heir could not be deprived of his right to heirship goods by any deed of the ancestor, either testamentary or on deathbed, but heirship goods might be disposed *in liege poustie*.⁹

SECTION 4.—HEIRLOOMS.

1369. Heirlooms, in the law of England, are such personal chattels as pass on their owner's death, by force of a special custom, to his heir, along with his inheritance, and not to his executor or administrator. Such are the best bed, table, pot, pan, cart, etc. The owner of heirlooms

¹ *Scot*, 1668, Mor. 5396.

³ *A. v. B.*, 1629, Mor. 5394; *Straton v. Chirnside*, 1636, Mor. 5395.

⁴ L. Burg. c. 125.

⁵ App. II.

⁷ *Drummond v. Drummond*, 1575, Mor. 5386.

⁸ *Knollis v. Halkerston*, 1489, Mor. 5385.

⁹ *Leith v. Leith*, 1863, 1 M. 949.

¹⁰ *Hepburn v. Skirving*, 1793, Mor. 5387.

¹¹ *Brown v. Brown*, 1527, Mor. 5386.

¹² *Stevensons v. Paul*, 1680, Mor. 5405.

² *Monro v. Monro*, 1730, Mor. 5400.

⁶ p. 234.

may dispose of them in his lifetime, but not by will.¹ At common law also, in England, there are certain chattels which are said to be of the nature of heirlooms, and as such pass to the heir. Included in this class are the coat of armour or other ensigns of honour of a nobleman, knight, or esquire; tombstones; a deed-box, in which the title-deeds of land are kept; and a few other articles. In popular language, the term heirloom is generally applied to plate, pictures, furniture, or other articles of property which, in England, have been assigned by deed of settlement, or bequeathed by will, to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. There cannot be an estate tail in personal property, and, accordingly, these chattels are assigned to trustees to be held upon trusts which will correspond (so far as the law may allow) with the uses declared by the settlement of the land.²

1370. An endeavour made to introduce into Scots law heirlooms in the popular sense has been unsuccessful. Two old Scots cases³ were supposed to decide that moveables might be effectually entailed. In the Outer House Lord Shand (Ordinary) held that an entail of such articles as furniture, plate, paintings, and furnishing in a mansion-house was ineffectual *inter hæredes*; ⁴ and although in a subsequent case⁵ the judges of the First Division, including Lord Shand, expressly abstained from pronouncing on the question of how far such articles can or cannot be entailed by the law of Scotland, Lord Shand's decision in *Kinnear* has now been approved by the Inner House.⁶

¹ Blackstone, Com. ii. 429.

² Williams on Settlements, p. 225; Williams on Personal Property, 18th ed., p. 514.

³ *Earl of Leven v. Montgomery*, 1683, Mor. 3217; *Veitch v. Young*, 1808, Mor., voce "Service and Confirmation," App. No. 4.

⁴ *Kinnear v. Kinnear* (O.H.), 1876, 4 R. 705.

⁵ *Marquis of Bute v. Marchioness of Bute's Trs.*, 1880, 8 R. 191.

⁶ *Sandys v. Bain's Trs.*, 1897, 25 R. 261; cf. *Adam's Trs. v. Wilson*, 1899, 1 F. 1042.

HEIRS AND BAIRNS. HEIRS PORTIONERS.

See HEIR.

HERALD.

See LYON KING OF ARMS.

HERALDRY.

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SECTION I.—INTRODUCTION.

1371. The subject of Heraldry is concerned with armorial bearings, otherwise termed armorial ensigns, arms, coat armorial, coat of arms, heraldic cognisances. These hereditary distinctive devices, regularly composed of specific tinctures and figures, were borne as marks of honour by warriors on, or over, their armour, on their banner, horse-clothing, etc.; by females upon their clothing; and by both sexes upon heritable property, tombstones, moveable goods, and especially upon seals testifying the execution of legal documents. At an early period the nature, composition, marshalling, and right to bear such devices were reduced to a system with definite rules, and became indicative of the rank, descent, family alliances, territorial dominion, feudal tenure, office, etc., of the bearers, and at the same time rights to exclusive and undisturbed use of these devices became recognised and enforceable by the common law.¹

1372. The science of armory developed during the twelfth century, and in illiterate ages was quite as important in civil life and legal practice as it was necessary in warfare. It is unlikely that any better means for distinguishing persons, families, and communities will ever be invented. The four principal objects of arms are:

1. To distinguish the noble from the ignoble.
2. To difference the branches and cadets of each family.
3. To illustrate the identity and descent of persons, families, and communities, and their ranks, both by the charges displayed in the shield and by additaments of honour, either within or around it.
4. To indicate ownership of moveables—which is presumed from the display of a man's arms thereon.²

¹ Hoppingius, De Insigniis, 1642.

² Mackenzie, Works, ii. 577.

1373. Armorial ensigns include:

1. The shield—displaying the armorial devices. This is the foundation of the bearings, without which the supplementary portions cannot exist. Its possession is the legal indication of the technical status of gentility—or “nobility” in the sense which that word still bears on the Continent.

2. The crest—surmounting the helmet, and displayed either upon a wreath, chapeau, or crest-coronet connecting the crest to a helmet befitting the wearer’s degree. Prior to the Restoration, crests were allowed to none under the rank of esquire.¹

3. The motto—which in Scotland is displayed above the crest.

Other “external additaments” may include supporters, compartment, collars of knighthood, badges, and in the case of peers the coronet of rank. The arms of men and of corporations are displayed upon shields, those of ladies upon diamond-shaped lozenges. A peeress is entitled to supporters and the coronet of her rank, but queens regnant and duchesses in their own right² are alone entitled to crest, motto, and helmet.

1374. The display of any device other than letters or numerals upon a shield, lozenge, cartouche or rectangular banner, or set upon a wreath, crest-coronet, or chapeau, constitutes an armorial bearing for legal or Inland Revenue purposes, and falls under the relative statutes and the powers of Lyon Court.

1375. Since coats of arms are the outward indication of nobility, and the power to ennoble is vested in the Crown, armorial bearings very soon became subject to strict supervision and regulation. This was necessary for practical reasons, viz. to settle disputes and prevent reduplication with consequent confusion in the field of battle, or fraud and misrepresentation on seals. A coat of arms, like a peerage or baronetcy, church patronage, or right of salmon-fishing, became a recognised form of incorporeal heritable property held of the Crown, and consequently entitled to State protection.

SECTION 2.—GRANT OF ARMS.

1376. The power of granting arms is a part of the royal prerogative,³ but the granting, differencing, and registering of them has been conferred by sundry statutes on the Lord Lyon King of Arms.⁴ In virtue of these Acts, no person, even if he claim or possess an hereditary right to arms, may exercise it unless the arms have been recorded in Lyon Register by him or by one of his ancestors of whom he is the legal representative. No cadet is entitled to bear the arms of his chief without a congruent difference assigned to him by the Lyon. No person may

¹ Addenda to Lord Lyon Balfour’s Roll of the 1633 Parliament (National Library MSS., xxxiv. 4, 16). ² *Buccleuch*, 1672, Lyon Register, i. 34.

³ Per Lord Robertson, *M’Donell v. Macdonald*, 1846, 4 Sh. App. 371.

⁴ 1592, c. 29, which refers to previous statutes; 1662, c. 53; 1669, c. 95; 1672, cc. 47 and 74, Record edition; 30 Vict. c. 17. See Kames, *Law Tracts*, “Courts,” 2nd ed., p. 211; Report of Commissioners of House of Commons on Office of Lord Lyon, 1822; J. H. Stevenson, *Heraldry in Scotland*.

assume unto himself¹ or anyone else,² or use, arms to which he has no registered right, or indeed any arms whatever, without the authority of the Lord Lyon. The statutes apply to corporations as well as individuals,³ and arms for such have been recorded in Lyon Register since its institution. Prior to 1540, direct grants of arms from the King of Scots are occasionally found, but thenceforth the practice has been for the Sovereign to issue a warrant ordering Lyon to grant the specific arms or augmentation,⁴ and under statute 1672, c. 47, which founded the Public Register of All Arms and Bearings in Scotland, it is expressly enacted that Lyon's authority is indispensable—whereby all future confusion or accidental duplication is avoided. The Lyon Register fulfils, in regard to armorial bearings, virtually the same purposes as the Register of Sasines does in regard to other forms of heritable property—though a coat of arms, being a “token of honour,” does (after registration) vest, like a dignity, *jure sanguinis*,⁵ and without service or sasine. Nevertheless, service or rematriculation may be the best evidence that it has vested, and in certain circumstances the arms may only vest subject to defeasance unless rematriculation takes place.⁶

1377. With Lyon resides the original jurisdiction of exercising the royal prerogative in granting arms, and except when acting in obedience to a royal command, his exercise of his power to grant or not grant, and the selection of the bearings, marks of cadency, or other differences which he assigns in the event of his granting an application, are discretionary and ministerial.⁷ If his decision involves no infringement of a right, the Court of Session and House of Lords will entertain no appeal from his decision or reduction of his decree.⁸

1378. Proceedings in Lyon Court are judicial in nature and form. Normally they originate in a petition (signed by the petitioner, his agent, or counsel) to the Lord Lyon. A grant of arms costs about £48, and a matriculation about £20 (in each case considerably higher when supporters are included). The grantee receives letters patent engrossed on vellum, and signed by Lyon. These narrate the circumstances of the grant and contain the destination governing the descent of the arms, and the essential portions of the grant are recorded in Lyon Register along with a duplicate of the drawing. A “matriculation” normally denotes the re-registration of an existing coat of arms, usually by a cadet in order to obtain from Lyon his “congruent difference,” but often by an heir of entail in remainder to the arms, an heir of line taking up the name, arms, and representation of a family, or even by an heir-

¹ *Fiscal v. Campbell of Shawfield*, 1729, Lyon Court.

² *Fiscal v. Earl and Countess of Wemyss*, 7th November 1732, Lyon Court.

³ *Fiscal v. Lord Provost and Mags. of Edinburgh*, 28th November 1732, Lyon Court.

⁴ *Scott of Thirlstane*, 1542, Nisbet, *System of Heraldry*, i. 98; *Dundas of Fingask*, 31st March 1769, Lyon Register, 16th July 1771.

⁵ *Fiscal v. Earl of Roseberry*, 9th July 1773, Lyon Court.

⁶ *Brisbane*, Lyon Office Record Book, p. 181.

⁷ *Cuninghame v. Cunyngham*, 1849, 11 D. 1139.

⁸ *M'Donell v. Macdonald*, 1846, 4 Sh. App. 371; *Stewart-Mackenzie v. Fraser-Mackenzie*, 1920 S.C. 764; 1922 S.C. (H.L.) 39.

male to place on record the intervening pedigree since the last registration, or if a collateral, to indefeasibly vest the undifferenced arms in himself as opposed to the heir of line. Rematriculation is also necessary if the existing arms are to be altered or a quartering added. The petitioner for a matriculation receives an official extract on vellum (signed by the Lyon Clerk) of the arms as rematriculated in Lyon Register.

SECTION 3.—TRANSFER OF ARMS.

1379. A provision is usual in wills and deeds of entail requiring the heir under the deed to assume and use the name, arms, and designation of the maker of the deed, and cases have even occurred of transfers of arms effected *inter vivos*. Armorial bearings being incorporeal hereditaments, held of the Crown under strict destinations, cannot be transferred by any act of the individual, and the true theory of these entails appears to be a resignation of the arms into the hands of Lyon (standing in place of the Crown), in whose grace the bearings are then placed, as a Scots peerage was in the hands of the Crown by a resignation prior to 1707,¹ when Lyon may give effect to the entailer's or resigner's desires, to such extent as in Lyon's absolute discretion he may consider proper.² The normal procedure by a petition to Lyon, narrating the clauses of the entail, can only be explained as a constructive resignation.

1380. It is essential that the entailer or resigner be in right of the arms of which he disposes, and an entail of arms, of which the entailer was not in right, was found void.³ The provision is held sufficiently complied with when the heir is able to shew that he has made an unsuccessful application to Lyon for authority to bear the prescribed arms.³ In the case of *Moir of Leckie*⁴ the Court of Session sustained a provision that the heirs of entail should assume the name and arms of Moir of Leckie—arms which it transpired did not exist. This was not deemed an impossible condition, and it was held incumbent on the heir to endeavour to obtain from Lyon a coat of arms "of that description descendible to the heirs of entail."⁴

1381. The manner and extent to which the heir must carry out the directions of the deed in assuming arms are dependent solely on the terms of the deed, and follow rules similar to those governing the assumption of the ancestor's name. When the husband of a female heir was obliged by the entail to "assume, use, bear, and constantly retain" the entailer's "surname and arms," he was found to have satisfied these conditions by prefixing the entailer's surname to his own and placing the entailer's arms in the 2nd and 3rd quarters of a quartered coat in which his own arms were 1st and 4th.⁵

¹ Riddell's Peerage Law, pp. 71, 72.

² *Myreton of Cambo*, 10th November 1701, Lyon Register, i. 504; Register of Genealogies, i. 227; *Grant of Auchernack*, 31st December 1777, Lyon Register, i. 515; Register of Genealogies, i. 229, 230; *Steuart of Allanton*, 15th April 1813, Lyon Register, ii. 101.

³ *Richards-Strachan*, 4th April 1900, Lyon Court.

⁴ 1794, Mor. 15537.

⁵ *Hunter v. Weston*, 1882, 9 R. 492.

SECTION 4.—EFFECT OF GRANT OF ARMS..

1382. A grant of armorial bearings confers ¹ (1) on the grantee a right to the full undifferenced arms of the grant, except in case of a lady, when the crest, if included, is for the use of her male heirs, or of her husband by courtesy.²

(2) A similar right for ever in the person who is for the time heir of the grantee according to the terms of the grant; unless, or until, such terms are altered or cut off by a resignation in Lyon's hands by any heir in possession, a proceeding which can only affect the actual cession of the arms vested in himself at the time of the resignation.

(3) On each daughter of the grantee, and of his heirs *ut supra*, both during her father's life and afterwards, a right to bear the undifferenced arms of the grant; if she be married or widowed, a right to bear them impaled with her husband's—but no right to any external additaments, and (unless she is the heiress under the grant) no right to any supporters nor to transmit any rights under the grant to her heirs.

(4) A right in the heir-apparent or presumptive ³ of the heir in possession to bear, during the latter's life, the arms of the grant, differenced by a label of three points, and to bear the crest and supporters undifferenced; ⁴ but it is usual for the heir using supporters to difference the supporters with a label.

(5) A right to each cadet within the limitation of the grant, and each male or representative of his line, to have the arms of the grant rematriculated in the Register (with a congruent difference) as his arms, which become inheritable *ut supra*.

SECTION 5.—SUCCESSION TO ARMS.

1383. A grant of arms to A. B., or an entry of the arms of A. B. in the Lyon Register, without further specification, is deemed to be a grant to A. B. and his heirs according to the law of arms.⁵ Most modern grants are destined to the grantee and his descendants, or to a series of heirs of entail. The right of succession to the undifferenced arms, as between the collateral heir-male and the heir of line, has never been directly settled,⁶ but Lord Jeffrey ⁷ observed that “the true principle should be, that the undifferenced arms should follow the principal representation of the family,” whilst Lord Sands ⁸ favours the heir-male. The rule laid down in Lyon Court, apparently by the Lyon Depute in

¹ Stevenson, *Heraldry in Scotland*, p. 333.

² Per Lord Advocate, *Balfour of Burleigh Peerage* case, p. 166, Proceedings, 15th July 1867.

³ *Sir John Hay of Kellour*, qua “nearest kinsman” to Erroll, Lyon Register, i. 161.

⁴ *Fergusson-Cunninghame younger of Caprington*, 2nd November 1920, Lyon Register, xxiv. 68.

⁵ Stevenson, *op. cit.*, p. 335.

⁶ Seton, *Law and Practice of Heraldry*, p. 321; Stevenson, *op. cit.*, p. 335.

⁷ *Cunninghame v. Cunyngham*, 1849, 11 D. 1139; Stevenson, *op. cit.*, p. 354.

⁸ *Stewart-Mackenzie v. Fraser-Mackenzie*, 1920 S.C. 764.

1771,¹ is, that the heir of line may obtain a matriculation of the undifferenced arms unless the collateral heir-male has already rematriculated them in his own name. It therefore appears that the principal arms vest tacitly in the heir-male, but (unless he rematriculates in his own name) subject to defeasance if the heir of line elects to take up the principal representation of the family. For this purpose a rematriculation is necessary, since no man can bear his mother's arms without the Sovereign's authority,² granted through the proper channel—the King of Arms.

1384. In practice, a grant or rematriculation of arms in name of a lady, with crest and motto (for her male heirs), is deemed sufficient authority for the use of such arms by (a) her husband, by courtesy;³ (b) her descendants (*i.e.* successive heirs), according to the laws of arms, without rematriculation—until the succession again passes through a female.⁴

1385. An individual may inherit two or more achievements—*e.g.* a cadet whose direct ancestor has matriculated may eventually succeed to the chief arms. He will be heir *jure sanguinis* in both and may use either,⁵ but may not select part of one and part of the other, since no such coat would be “matriculated,” and a rematriculation is desirable as evidence of succession to the principal arms, which are those usually preferred.

SECTION 6.—FOREIGN ARMS.

1386. “Foreign” armorial bearings (a term which includes English and Irish arms) may, by courtesy, be used by temporary residents, but domiciled inhabitants of Scotland must “matriculate” them in Lyon Register, for the statute covers “all” arms in Scotland.⁶ The English procedure termed “exemplification” of foreign arms is contrary to the statute and to Lord Coalstoun's Recommendations for Lyon Court Procedure (made by advice of the Lords of Session, 1762), which require the Lord Lyon's warrant for every entry on the Register.

SECTION 7.—MARSHALLING OF ARMS.

SUBSECTION (1).—*Impalement.*

1387. The union of husband and wife is represented by “impalement,” viz. the representation of the coats of arms of both parties upon one shield, divided by a perpendicular line, the husband's arms on the dexter, the wife's on the sinister. If either coat is surrounded by a bordure, the portion of the bordure next the paler line is omitted. In

¹ *Brisbane*, Lyon Office Record Book, p. 181.

² Mackenzie, Works, i. 616.

³ *Balfour of Burleigh*, *supra*.

⁴ *Barclay-Allardyce*, 2nd July 1883, Lyon Register, xi. 30; *Fraser-Mackenzie of Allangrange*, 7th February 1908, Lyon Register, xix. 66; *Carnegy-Arbuthnott of Balnamoon*, 21st June 1923, Lyon Register, xxv. 76.

⁵ *Fiscal v. Earl of Roseberry*, 9th July 1773, Lyon Court.

⁶ *Waring*, 22nd March 1926, Lyon Register, xxvii. 5.

England, and now occasionally in Scotland, the arms of an "heiress in blood" are placed on an "inescutcheon of pretence," but in Scotland this form of marshalling is to be deprecated, for with us the inescutcheon has a different meaning.¹ The Scots practice has usually been to impale the heiress's arms² until after the birth of an heir, when a right of courtesy arises,³ and thereafter the husband would (or might) marshal the arms of both families quarterly,⁴ for which purpose a rematriculation is necessary.⁵ Impalement, being a temporary conjunction of two separate registered coats of arms during the subsistence of the marriage only, requires no matriculation, and though impaled coats occasionally appear in Lyon Register, they are not heritable in that form.

SUBSECTION (2).—*Quarterings.*

1388. Quarterings represent (a) the coats of arms of heiresses in whom a registered coat of arms has vested as heir according to the law of arms; or in whom such a coat would have vested if her father had rematriculated it; or of heiresses of entail; (b) coats of arms of persons who have validly resigned their arms in favour of some other armigerous person, to be borne quarterly with that person's own arms;⁶ (c) arms of fiefs, lordships, offices, or earldoms; (d) arms of affection,⁷ viz. arms of some person who has consented to their being granted by Lyon as a quartering, irrespective of heirship either in blood or property. In Scotland, the shield has only four quarters, but these may be subdivided, forming "grandquarters," and thus permit the display of more coats. Unless for substantial reasons, elaborate schemes of quartering are discouraged in Scotland, and every addition, discontinuance, or alteration of quarterings involves rematriculation since the quartered coat, as registered, becomes unalterable until rematriculated. In practice, the owner of a shield including many quarterings occasionally uses the first quarter alone, when decorative reasons preclude display of the full achievement.⁸

SUBSECTION (3).—*Inescutcheon.*

1389. In Scotland, the use of the "escutcheon en surtout" approximates more to continental than to English practice. It usually displays (a) arms of augmentation or special concession; (b) arms of earldoms, lordship, offices; (c) paternal arms. The inescutcheon forms an integral part of the achievement as matriculated, and, unlike the English

¹ Mackenzie, Works, ii. 622; Stevenson, Heraldry in Scotland, i. 175.

² Mackenzie, *op. cit.*

³ *Balfour of Burleigh Peerage*, Proceedings, pp. 33–41 (19th July 1864), p. 166 (15th July 1867).

⁴ *Maxwell of Terregles, Lord Herries*, 3rd April 1567, see Seton's Law and Practice of Heraldry, p. 73; Macdonald, Scottish Armorial Seals, No. 1897; *Irvine of Kingcausie*, 16th June 1676, Lyon Register, i. 336.

⁵ *Irvine-Fortescue of Kingcausie*, 17th July 1919, Lyon Register, xxiv. 7.

⁶ *Stewart of Allanton*, 15th April 1813, Lyon Register, ii. 101–2.

⁷ *Earl of Glasgow*, 9th May 1905, Lyon Register, xviii. 32.

⁸ *E.g.* shields in Thistle Chapel, St. Giles Cathedral.

“inescutcheon of pretence,” cannot be adopted or abandoned at pleasure.

SUBSECTION (4).—*Official Arms and Insignia.*

1390. These are (a) impaled with the paternal coat—when the official coat is placed on the dexter, *e.g.* official coat of the Lord Lyon King of Arms; (b) placed on an escutcheon en surtout, *e.g.* official coat of the Heritable Constable of Aberdeen;¹ (c) quartered, *e.g.* official coat of H.M. Usher of the Green Rod;² or (d) represented by external insignia, *e.g.* the swords in saltire of the Lord Justice-General.³ The assumption of official arms, like matrimonial impalement, requires no rematriculation when both the official and personal arms are already recorded and the right to them is in the official *virtute officii* and *jure sanguinis* respectively; but when for any reason matriculation ensues, or the official receives a grant of arms, the official arms or insignia duly appear in Lyon Register along with the personal arms, though the latter alone are heritable in ordinary course, that is, unless the office be heritable and descendible in the same line as the personal arms.

SECTION 8.—PROTECTION OF ARMORIAL RIGHTS.

1391. Arms once granted either by the Lord Lyon or by Parliament are the exclusive property of the grantee and his successors in terms of the grant, and as such are protected to him.⁴ It is an infringement of the rights of the owner of a coat of arms, and is a real injury to him, if another person assumes it, or even attributes it to another party.⁵ “By the civil law, he who bears and uses another man’s arms to his prejudice, *vel in ejus scandalum et ignominium*, is to be punished arbitrarily at the discretion of the judge: but he who usurps his prince’s arms, loses his head, and his goods are confiscated.”⁶ If tried in Lyon Court for usurping the Royal Arms, he is, if found guilty, to be “puneist to the deid,” and his goods “inbrocht to the Thesaurie.”⁷ “Real injuries are committed by hindering a man to use what is his own . . . by wearing in contempt what belongs to another man as a mark of honour.”⁸ “Real injuries are committed by doing whatever may hurt one’s person . . . or may affect his honour or dignity, as assuming a coat of arms or any mark of distinction proper to another . . . and the offence is punished arbitrarily by the Judge Ordinary, according to the circumstances attending it, either by fine or imprisonment.”⁹

¹ *Forbes of Waterton*, Lyon Register, i. 149.

² *Brand*, 4th February 1721, Lyon Register, i. 123.

³ *Lord Dunedin*, 20th January 1907, Lyon Register, xix. 24.

⁴ *Cunninghame v. Cunyngham*, 1849, 11 D. 1139.

⁵ *Fiscal v. Earl and Countess of Wemyss*, 7th August 1732.

⁶ Sir G. Mackenzie, *Science of Heraldry*, treated as a Part of the Civil Law and Law of Nations.

⁷ *Liber Curiarum et Processus* of Lord Lyon Sir Robert Forman of Luthrie, 1559.

⁸ Sir G. Mackenzie, *Laws and Customs of Scotland in Matters Criminal*, i. 30, 3.

⁹ *Ersk.* iv. 4, 81; *Seton*, p. 19.

1392. Persons, including corporations, in right of arms may not authorise others to bear their arms, for this would contravene Lyon's statutory authority, confusion would result, and the Treasury would be defrauded of fees. Such practices amount to unlawfully "assuming arms unto" the favoured person.¹ To constitute an offence there must be usurpation or assumption, which may be inferred from certain forms of display. Decorative or historical display, where the arms are attributed to their proper owners and not brought into ridicule or contempt, is obviously a normal and lawful practical use of heraldry for its proper purpose.

1393. The original jurisdiction to punish for contraventions of the law of arms, or for redress of wrong in a matter of arms, or to decide in a competition as to right to arms, resides in the Lyon Court, which has a customary law and pre-statutory jurisdiction in such matters.² An appeal lies from the Lyon Court to the Inner House of the Court of Session,³ and finally to the House of Lords.⁴ The appeal to the Court of Session appears to be as representing the Scots Privy Council,⁵ to which appeals from Lyon Court were rendered competent by Act of Council, 8th June 1630.⁶ If the arms claimed have been already granted by Lyon, and decree pronounced by him, the claimant must seek his remedy in an action of reduction, which should be raised in Lyon Court, since the Lord Lyon, being originally a sovereign judge,⁷ can reduce his own decrees.⁸

1394. Popular action being unknown to our law, no appeal, or reduction of a grant by Lyon, will be entertained, save at the instance of the Procurator-Fiscal of the Lyon Court, for any interest of the Crown, or of a competitor claiming the arms in question.⁹ The validity of a patent or matriculation granted by Lyon must be challenged in the regular way before it can competently be called in question as a side-issue in a declarator of irritancy, on the ground of contravention of a condition of an entail.¹⁰ The Court of Session will inquire whether Lyon has differenced an applicant's shield with a true mark of cadency where the provisions of an Act of Parliament require it, but it will not prescribe the mark of cadency which he is to assign.¹¹

1395. Unauthorised assumption and use of arms creates no right or property in them; it is a statutory offence, rendering the user liable to a fine of £100 Scots, and the escheat of all articles on which the arms

¹ *Fiscal v. Earl and Countess of Wemyss*, 7th August 1732.

² *Burnet of Burnelland v. Burnett of Leys*, c. 1546; Mackenzie, Works, ii. 632; *Macrae's Trs. v. Lord Lyon*, 1926 S.N. 91.

³ *Procurator-Fiscal of the Lyon Court*, 1778, Mor. 7656; *per Cur.* in *M'Donell v. Macdonald*, 1846, 4 Sh. App. 371.

⁴ *Stewart-Mackenzie v. Fraser-Mackenzie*, 1922 S.C. (H.L.) 39.

⁵ Ersk. xi. 3, 23.

⁶ Reg. Privy Council, 2nd ser., iii. 555.

⁷ *Symson v. Strang*, 8th May 1854, Burgh Court Books of Haddington (Riddell MSS., vol. ii., Signet Library).

⁸ *Dundas v. Dundas*, 28th February 1757, Lyon Court.

⁹ *M'Donell*, *supra*; *Stewart-Mackenzie*, *supra*.

¹⁰ *Hunter v. Weston*, 1882, 9 R. 492. ¹¹ *Cuninghame v. Cunyngham*, 1849, 11 D. 1139.

appear,¹ and the Lord Lyon may erase or order the removal of the unwarrantable arms from heritable property.² He may grant warrants for execution through his own officers,³ and where necessary letters of horning are competent under the Act 1669, c. 95.⁴ The only statutory evidence of lawful registration of arms is (a) an entry in Lyon Register; (b) letters patent or an extract matriculation from the register; (c) a statutory receipt of arms "produced" between 1672/6.⁵ Where none of the above are extant, but armorial bearings are proved to have been used both before 1672 and also *inter* 1672–1762, the penalties of fine and escheat are not exigible until expiry of a charge to matriculate within six or fifteen days, but matriculation is in every case essential.⁶ The decision in *Murray's* case, which was characterised by legal specialties, was pronounced under a misapprehension, and in view of *res noviter* regarding the procedure following on the Statute 1672, c. 47, the leniency could not now be sustained. If no arms appear in the Register there is a presumption that none have been borne.⁷

SECTION 9.—LICENCE DUTY ON USE OF ARMS.

1396. A sum of one guinea is payable annually by persons displaying armorial bearings, and two guineas if displayed on any carriage (see *Excise*).⁸ These taxes are merely for a licence to use armorial bearings, and must be paid whether the whole achievement or only a part of it, *e.g.* crest, is displayed. Payment of the tax neither creates nor proves any right to arms, which must be established in Lyon Court before the licensee can have any arms to display.

SECTION 10.—ROYAL ARMS.

1397. These are ensigns of public authority, representing the sovereignty of the dominions to which they relate. They pass with that sovereignty, either by conquest, succession, or election.⁹ The Royal Arms of Great Britain, quarterly 1st and 4th, are (1) the arms of dominion for Scotland; (2) the arms of dominion for England; (3) the arms of dominion for Ireland. No part of the Royal Arms can be granted by Lyon, except under a special warrant directed to him by the King, but even the Royal Arms fell under the provisions of the Act 1672, c. 47. So Charles II. recorded two coats of arms: (a) the lion rampant within its tressure (with its external additaments), for his sovereign achievement as King of Scots; (b) the quartered Royal Arms with the lion rampant

¹ 1672, c. 47.

² *Macrae's Trs. v. Lord Lyon*, 1926 S.N. 91.

³ *Liber Curiarum et Processus* of Lord Lyon Sir Robert Forman of Luthrie, 1559; *Fiscal v. Campbell of Shawfield*, 1729, Lyon Court.

⁴ Acts, vii. 633.

⁵ *City of Elgin*, 9th October 1678, Lyon Register, i. 461, 28th November 1888.

⁶ *Fiscal of the Lyon Court v. Murray of Polmaise*, 1778.

⁷ *Stewart-Mackenzie v. Fraser-Mackenzie*, 1920 S.C. 800.

⁸ Vol. VI. p. 490, *ante*.

⁹ Nisbet, *System of Heraldry*, part iii. p. 89.

1st and 4th, for his sovereign achievement as King of Great Britain. Both these achievements, and any parts of them, are therefore protected to the Crown as registered proprietor.

1398. Since display of the Royal Arms implied direct royal authority, and their usurpation was particularly liable to abuse, persons who do so are liable to "pane of deid and escheiting of all their goods" to the Treasury upon conviction in Lyon Court, to which Sheriffs and magistrates are to remit such persons under a Royal Warrant, ult. Feb. 1558/9.¹ Under the Act 1592, c. 125, any magistrate may punish and summarily incarcerate for this offence, whilst the capital penalty would still fall to be pronounced in any case remitted to Lyon Court. By circular, 18th June 1907, the Secretary for Scotland informed the police that the prohibition against misuse of the Royal Arms did not apply with "equal force" to the display of the Scots Royal Arms alone. This circular neither could, nor does it attempt to, create or confirm any armorial right, which only a Royal Warrant or statute could legally effect. On 16th July 1907 the Secretary for Scotland stated in Parliament that it was not to be inferred from this circular that persons without qualification were at liberty to fly the "Lion Flag."²

1399. Lords Lieutenant of Scottish counties and their deputies probably have power to "display the King's Banner" *virtute officii*, and such a power was invariably included in Scots Commissions of Lieutenancy.³ The Scots "King's Banner" in this sense is His Majesty's "Lion Flag." Display of the quartered Royal Banner is by modern official regulations confined to occasions when His Majesty is personally present.⁴

SECTION 11.—TRADE MARKS (ARMORIAL).

1400. Armorial bearings and trade marks are fundamentally separate systems of identification, each having its own sphere and purpose,⁵ and their intermixture is to be deprecated. The modern "armorial trade mark" is presumably inspired by a desire to suggest distinguished patronage, but it only shews that this is lacking: otherwise the arms of the Crown or of some magnate would be displayed "by appointment," and altogether apart from the trade mark. Accordingly, just as decorations or titles—even Esquire—are not used for trade purposes, respectable firms will avoid the "armorial trade mark."

1401. Under the Trade Marks Act, 1905,⁶ s. 11, it is not lawful to "register as a trade mark or part of a trade mark, any matter the use of which would . . . be disentitled to protection in a Court of justice, or would be contrary to law." In Scotland, therefore, no person can use, or register as a trade mark or part of a trade mark, any armorial

¹ Liber Curiarum et Processus, folio 18; Mackenzie, Works, ii. 583.

² Hansard, 4th ser., vol. 178, p. 544.

³ E.g., Spalding Club Miscellany, ii. 329.

⁴ 17th March 1907, Police Circular 512.

⁵ Mackenzie, ii. 584.

⁶ 5 Edw. VII. c. 15.

bearings, crest, or portion thereof, unless the said coat of arms or portion thereof is the registered property of such person or firm, viz. matriculated in Lyon Register in the name of such person or firm, or of some person of whom the applicant is the legal representative according to the laws of arms. Moreover, any existing registration of armorial trade marks which are not the property of the applicant according to the laws of arms is void under s. 41, notwithstanding that they may have been used for over seven years; and their use renders the user liable to the statutory penalties. It is therefore impossible for anyone to misappropriate, under the guise of a registered trade mark, a coat of arms which might be the property of some other person. For practical purposes the effect of the law is that any person or firm desiring to use an armorial trade mark must pay the Treasury fees exigible in Lyon Office for a grant of arms, in addition to the ordinary trade mark fees.

1402. Sec. 68 strikes at any further recognitions of trade marks containing the Royal Arms or portions thereof, but saves the right, if any, of the user of a trade mark of this nature, used anterior to the Act. Whatever may be the effect of this section in England, there is in Scotland obviously no "right" to be saved, and the use in Scotland of a trade mark containing any portion of the Royal Arms is a serious delict for which either penal proceedings involving forfeiture, or the ordinary civil proceedings for fine and confiscation of moveables, might at any moment be instituted. The jurisdiction of the Lyon Court in such matters is preserved under s. 69.

SECTION 12.—BADGES.

1403. These are divided into two distinct categories, and are under the control of the Lord Lyon.¹

(a) The armorial badge, a term freely applied to the crest, usually when borne as a decoration upon a retainer's livery² and upon the standard—a long pointed flag. Accordingly, when a crest is borne, as in a cap badge, within a "belt and buckle,"³ it appears to be borne *qua* retainer and not *qua* proprietor. This symbol is distinct from the English "garter."

(b) Non-armorial badges, which are conventional devices displayed upon retainers' livery and are characterised by the absence of either shield, wreath, chapeau, or crest-coronet. They are not liable to Excise duty.

1404. Badges became popular in the sixteenth century, especially in England where coats of arms had become over-complicated by quartering. The best-known badges are the crowned thistle and rose, and the crosses of St. Andrew and St. George. St. Andrew's cross was the royal badge ordained to be displayed by all Scotsmen, both by

¹ Privy Council, 2nd ser., iv. 156, 3rd March 1631.

² Mackenzie, *Science of Heraldry*, c. xxix.; *Heraldry in Scotland*, p. 222.

³ Lyon Register, v. 81, 6th February 1856.

land and sea, as evidence of their identity.¹ On this account it became the recognised symbol of Scots nationality, and "the arms of Scotland, viz. a cross commonly called St. Andrew's cross," was so recognised in Parliament in the seventeenth century.² Accordingly, it forms the national flag of Scotland. Since the saltire became the national symbol, a special variety thereof, environed in the centre with a crown of *fleurs-de-lis*, has been used when the saltire is displayed *qua* Royal Badge,³ and (formerly) in connection with the Order of the Thistle.

1405. Under the Chartered Associations (Protection of Names and Uniforms) Act, 1926,⁴ provisions are made for "protection," by Order in Council, of certain uniforms and badges. Where any badge to be "protected" under this Act includes an armorial bearing or portion thereof, it is necessary that such armorial bearing be recorded in Lyon Register in name of the chartered company, otherwise the "protection" of such badge under the 1927 statute will not save the chartered company from the statutory penalties for "assuming unwarrantable arms." This statute, like the Trade Marks Acts, has principally been directed to English conditions where no Public Register of All Arms and Bearings exists. It requires to be emphasised that before any advantage in the form of proprietary title or right of use can be acquired or enjoyed in Scotland under these modern statutes, if the device is armorial, it is essential that the same should first have been recorded in the Public Register of All Arms and Bearings in Scotland.

¹ Acts of Parliament, 1388, vol. i. p. 555; Mackenzie, Works, ii. 602.

² Acts, vi. (ii.) 817.

³ Mackenzie, ii. 635.

⁴ 16 & 17 Geo. V. c. 26.

HEREDITAS JACENS.

See APPARENT HEIR; ADJUDICATION; CONSTITUTION
(ACTION OF); HEIR; PASSIVE TITLE.

HERITABLE AND MOVEABLE.

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SECTION 1.—INTRODUCTORY.

1406. The distinction between immoveable and moveable, as applied to things and rights, is fundamental, and would subsist as practically important, even if the parallel distinction between heritage and executry were swept away, as is sometimes proposed. It is unfortunate that the two distinctions have been jumbled together through the caprice of our writers or the special prominence in early times of one example of the importance attached to the physical division of things; that thus “heritable”—that which, as a rule, goes undivided to a single heir—is opposed to “moveable,” a term which has in essence no relation to succession; and that these two terms are used as including between them all things and rights. It is true that the distinction is all-important in cases between the heir of a deceased person and his executors—or next-of-kin in the wider sense of the term. But it also appears in questions (in the old law) between wife and husband; in questions, as to legal family rights, between the heir on the one hand, and the widow, husband, and younger children of a deceased person on the other; between the purchaser and seller of immoveable property with its plenishing; between heritable creditors and the ordinary creditors of a debtor, or his trustee in bankruptcy; between the users of heritable and the users of moveable diligence; between the heir of immoveable property and the liferenter's representatives; between landlord and tenant; and between territorial rules of law and rules which follow the person. In all these cases the persons or Courts concerned in the first-mentioned side of each group desire that the thing or right should be held to be immoveable, and the others have an opposing interest. Except in questions between landlord and tenant, the criteria for discriminating between the two are substantially the same; and, seeing that even this divergence arises only in regard to fixtures, it will be possible in the present article to proceed as if there were no divergence at all.¹

¹ See Fixtures, 149, *ante*.

1407. The point of time which has to be looked to in the above questions is that of the death, marriage, sale, diligence, or ish of lease. Nothing that occurs after that date avails to alter the complexion of the right or thing,¹ except in certain cases of constructive conversion.²

It is a convenient division of the subject to view the rules of law as applied to things tangible (*res corporales*), and as applied to rights (*res incorporales*).

SECTION 2.—THINGS.

1408. Lands, buildings, minerals, and soil *in situ*, trees,³ growing shrubs, and turf⁴ attached to the soil, and natural crops unsevered, such as grass, are heritable. On the other hand, ships, industrial fruits, such as growing crops, including, it is thought, hay both of the first and second crop,⁵ and trees in a nursery garden,⁶ and all things that move or are displaceable *in specie*, are moveable. Cases involving questions of great delicacy arise when what is in its nature moveable has come to be attached physically to what is heritable; but these are treated more appropriately elsewhere. See FIXTURES; HEIR. Dung on a farm where the lease had run several years was held heritable *destinatione*.⁷

SECTION 3.—RIGHTS.

1409. These are heritable or moveable according as they do or do not relate directly to what is corporeally heritable. Thus rights in and to lands, in the widest sense of the word, whether absolute or (with certain exceptions) redeemable,⁸ in fee-simple or limited, including superiorities, teinds, casualties, feu-duties, ground-annuals, servitudes, real burdens, and leases, are heritable; and it is immaterial whether title has been completed or not. On the other hand, right of action (other than real action), a *jus crediti*,⁹ a right to a share of the proceeds of heritage,¹⁰ patents,¹¹ and copyrights¹² are moveable. A right to a sum of money lent on the security of a 999 years' lease,¹³ recorded with a back letter, has been held to be moveable. "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators as personal or moveable, and not real or heritable estate;"¹⁴ but the title to it "shall

¹ Ersk. ii. 2, 20.

³ *In re Ainslie*, 1885, 30 Ch.D. 485.

⁴ *Burns v. Fleming*, 1880, 8 R. 226; and see *Nisbet v. Mitchell-Innes*, 1880, 7 R. 525.

⁵ *Lyall v. Cooper*, 1832, 11 S. 96.

⁷ *Reid's Exr. v. Reid*, 1890, 17 R. 519.

⁸ *Earl of Kintore v. Countess Dowager of Kintore*, 1885, 12 R. 1217.

⁹ *Wardlaw's Tr. v. Wardlaw*, 1880, 7 R. 1070; *Borland v. Borland*, 1913 S.C. 704.

¹⁰ *Gilligan v. Gilligan*, 1891, 18 R. 387.

¹¹ *Advocate-General v. Oswald*, 1848, 10 D. 969.

¹³ *Stroyan v. Murray*, 1890, 17 R. 1170.

² See para. 1410, *infra*.

⁶ *Begbie v. Boyd*, 1837, 16 S. 232.

¹² 5 & 6 Vict. c. 45, s. 25.

¹⁴ 53 & 54 Vict. c. 39, s. 22.

devolve according to the nature and tenure thereof, and the general rules of law thereto applicable in trust so far as necessary for the persons beneficially interested.”¹ Similarly, shares in a company are moveable though the whole or part of its property be heritable.² Right to trade marks and to trade names appears to be purely moveable; while goodwill may savour of heritage to a greater or less extent according to circumstances.³ Rights having a tract of future time, *i.e.* such as give a claim to payment periodically (like an annuity) without having relation to a principal sum (like interest) are heritable.⁴ The reasons given for this rule are that these rights, yielding annual profits, are *quasi feuda*, and that they are unsuitable for being treated as executry, which ought to be capable of being ingathered and distributed soon after the death of the donor.⁵ But arrears of annual returns of debts and funds, themselves heritable, are held to be moveable though secured on land. Arrears of rents and of feu-duties and arrears of interest of heritable bonds are also moveable.⁶

For the specialties in regard to bonds and the history thereof, see BOND. Some modern forms of mortgage and debenture are moveable in terms of express declaration in the statutes under the authority of which they are issued.⁷

SECTION 4.—CONSTRUCTIVE CONVERSION.

1410. There are many cases in which things or rights, heritable or moveable according to the rules above briefly indicated, are for certain purposes converted from that character into the opposite character by something done by their deceased owner either *inter vivos* or *mortis causa*.

SUBSECTION (1).—Unfulfilled Contracts.

1411. The most familiar instance of moveable property coming to be treated as heritable in succession through *inter vivos* acts occurs where money is, at the date of the party's death, required to complete a building or other enterprise according to a plan, contracted for at that date and not fully or at all paid for. The money comes out of the moveable succession and goes to the benefit of the heir, seeing that the deceased had intended to benefit the heritage at the expense of the personal estate.⁸ Another case is where the deceased has contracted to buy

¹ 53 & 54 Vict. c. 39, s. 20 (2). ² 8 & 9 Vict. c. 17, s. 7; 25 & 26 Vict. c. 89, s. 22.

³ *Hughes v. Assessor for Stirling*, 1892, 19 R. 840; *Graham's Exr. v. Cairn's Tr.*, 1904, 6 F. 1015; *Muirhead's Trs. v. Muirhead*, 1905, 7 F. 496; *Murray's Trs. v. M'Intyre*, 1904, 6 F. 588; *Graham v. Graham* (O.H.), 1898, 5 S.L.T. 319.

⁴ *Hill v. Hill*, 1872, 11 M. 247; *Reid v. M'Walter*, 1878, 5 R. 630; *Dawson's Trs. v. Dawson*, 1896, 23 R. 1006; *Bennett's Exr. v. Bennett's Exrs.*, 1907 S.C. 598; *Stewart's Trs. v. Battcock*, 1914 S.C. 179; *Ross v. Ross' Trs.* (O.H.), 1901, 9 S.L.T. 340.

⁵ Ersk. ii. 2, 6.

⁶ Bell's Prin., s. 1479; Ersk. ii. 9, 64.

⁷ *M'Wiggin's Trs. v. M'Wiggin*, 1922 S.C. 276; *Robertson's Trs. v. Maxwell*, 1922 S.C. 287.

⁸ *Malloch v. M'Lean*, 1867, 5 M. 335; *Bank of Scotland v. White's Trs.*, 1891, 28 S.L.R. 891.

heritage, and his executor has to pay for it, and thus benefit the heir.¹ The converse case is of greater importance. A bargain for the sale of the deceased's estate has been completed before his death; but the disposition has not been executed and the price has not been paid. The heir-at-law or other person entitled to the heritage is bound to grant the disposition; but the price goes to swell the executry.² The same rule applies where the transfer of the heritage is by compulsory surrender under the Lands Clauses Acts, and the price is really compensation. The money falls to executry, not to the heir.³ The same is true of the price of land held *pro indiviso* and sold in an action of division and sale.⁴ This form of conversion affects the whole estate of the deceased, and is not trammelled by the legal rights of widow, widower, or children.

SUBSECTION (2).—*Conversion, mortis causa.*

1412. The operation of a settlement cannot (in contrast to the foregoing) interfere with these legal rights; cannot trench on the terce, courtesy, *jus relictæ*, *jus relictæ*, or *legitim*; and cannot affect the sources from which these rights are respectively drawn.⁵ The cases are divisible into two categories.

(i) *The Effect on the Deceased's own Succession.*

1413. Assume that there is a direction in the will to sell or buy heritage, and that the persons entitled to succeed (either *de plano* or failing others) are described in words—such as his “heirs,” “heirs and assignees,” “heirs and successors”—which are flexible in the sense of being applicable either to heirs in heritage or heirs *in mobilibus*. It seems the better opinion—though there are *dicta* to the contrary—that a direction to sell sends the subject or its price to the latter heirs, and that a direction to buy sends the price or the heritage bought to the former.⁶ But if realisation of heritage—which is the ordinary case—is directed in the settlement for certain purposes which do not exhaust the estate, and a balance is left in intestacy, there is no conversion of that balance, and heir and executor share it in proportion to the original value of the heritable and moveable estate respectively.⁷ The same is true where certain of the purposes for which realisation was ordered lapse; *pro tanto* the direction lapses with them.⁸

¹ *Ramsay v. Ramsay*, 1887, 15 R. 25.

² *Chiesley*, 1704, Mor. 5531.

³ *Heron v. Espie*, 1856, 18 D. 917.

⁴ *Macfarlane v. Greig*, 1895, 22 R. 405; cf. *Royal Bank of Scotland v. Maxwell's Trs.* (O.H.), 1911, 2 S.L.T. 175; *Howden, Petr.* (O.H.), 1910, 2 S.L.T. 250.

⁵ *Lashley v. Hog*, 1804, 4 Pat. 581.

⁶ *M'Laren on Wills*, i. 234.

⁷ *Cowan v. Cowan*, 1887, 14 R. 670; *Moon's Trs. v. Moon*, 1899, 2 F. 201.

⁸ *Thomas v. Tennant's Trs.*, 1868, 7 M. 114; *Smith v. Wighton's Trs.*, 1874, 1 R. 358; *Brown's Trs. v. M'Intosh*, 1905, 13 S.L.T. 72; *M'Conachie's Trs. v. M'Conachie*, 1912 S.C. 613.

(ii) *The Effect on a Beneficiary's Succession.*

1414. This is the case of constructive conversion which most frequently occurs; and it cannot be said that the current of decision has always flowed smoothly. No difficulty has arisen in practice, where money or other moveable property is left by the deceased with a power conferred or a duty imposed in the will on his trustees to turn it into land; for this is usually done for the benefit of a single person with a prescribed—usually an entailed—destination.¹ Nor is any difficulty found in the converse case of heritage being left by a testator, which he destines either directly or with the intervention of a trust to a legatee and his heirs. If the legatee dies intestate and without having altered the nature of the estate, his heir-at-law takes to the exclusion of his heirs *in mobili-bus*. The real difficulty arises from the fact that many settlements contain a direction to the trustees to sell heritage, and most settlements contain a power to sell; and the question then is, which of a beneficiary's representatives—his heir-at-law or his executors—shall benefit on the beneficiary's death where he has not disposed of his vested interest in the trust estate. An excellent illustration of the difficulties which may arise may be seen in the case of *Strachan*.²

1415. Where there is a direction to sell, if the direction comes into force, or would do so if the trust were allowed without interference by the beneficiaries to run its prescribed course, there is no doubt that conversion is effected.³ The result of a failure, total or partial, of the purposes in pursuance of which sale was ordered has been already referred to.⁴ Moreover, a power to sell may by implication be equivalent to a direction to sell.

1416. It is unnecessary that the word "direct" or an express equivalent should occur in the settlement. "It is sufficient that the just construction of the whole instrument, taken together, shews that nothing but sale was contemplated, and that the testator's views could not be carried into execution without a sale; that, in fact, it was the plain duty, under the instrument, of the trustees to effect the sale."⁵ In the case cited the terms of the instructions to the trustees, taken in their general collocation, were largely relied on. But in the majority of cases there is only implication, either from the purposes of the trust or from these in conjunction with the circumstances of the estate. So it was in *Boag*,⁶ where there was not even power to sell, but by inference from the purposes sale was considered necessary, and therefore power was implied, and

¹ See *Dick v. Gillies*, 1828, 6 S. 1065.

² *Strachan v. Mowbray*, 1843, 5 D. 687.

³ *M'Gilchrist's Trs. v. M'Gilchrist*, 1870, 8 M. 689; *M'Call's Trs. v. Murray*, 1901, 3 F. 380; *Bryson's Trs. v. Bryson* (O.H.), 1919, 2 S.L.T. 303.

⁴ Para. 1411, *supra*; see also *Dick v. Gillies*, *supra*; *Grindlay v. Grindlay's Trs.*, 1853, 16 D. 27.

⁵ Per Lord Jeffrey in *Advocate-General v. Williamson*, 1850, 13 D. 436; *affd.* 2 Bell's App. 89; *Baird v. Watson*, 1880, 8 R. 233; *M'Adam's Exr. v. Souters*, 1904, 7 F. 179.

⁶ *Boag v. Walkinshaw*, 1872, 10 M. 872.

as a consequence, conversion. But there is a presumption unfavourable to conversion, the rule being that neither trustees nor guardians can in their discretion alter the succession of beneficiaries or wards, and that reasonable, though not perhaps strict, necessity must dictate their acts if these are to have the force of conversion. The rule which is followed in practice was adopted by Lord Westbury in *Buchanan*,¹ from the dicta of Lord Fullerton in *Advocate-General v. Blackburn's Trs.*² "If instead of an absolute and unqualified trust or direction for sale the right to sell was made to depend on the direction or will of the trustees, or was to arise only in case of necessity, or was limited to particular purposes, as, for example, to pay debt, or was not indispensable to the execution of the trust, then in any of these cases, until the discretion was exercised, or the necessity arose or was acted on, or after the particular purpose was answered, there was no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable."³

1417. It may be laid down that hitherto the only circumstance which has told decisively in favour of conversion is that the trustees are directed to divide, and in the event have to divide, the estate from time to time among the beneficiaries, when, for example, they respectively reach majority, or, being females, are married, seeing that it would be unreasonable to expect the trustees to hold the heritage in *pro indiviso* shares with the beneficiaries earliest in right of possession.⁴ If, on the other hand, the division is in the event not gradual but *uno flatu*, the beneficiaries being reduced to one in number or being all major or married at the date of distribution, this rule does not apply.⁵ Other circumstances are merely make-weights for or against conversion.⁶ Thus, while it may be true that till recently "there had been no case, in which a testator used the words 'pay' and 'payment' or 'sums,' and no other words, where the decision has been against conversion,"⁷ and that in cases where conversion has been negatived these words have been associated with others such as "convey" or "dispone," nevertheless the case of *Anderson's Exr.* shews that it would be unsafe to treat a bald direction or power, pointing *prima facie* to delivery in cash, as an infallible guide towards a direction to convert.⁸ Again, the number of the beneficiaries among whom the estate has to be distributed is, no doubt, not to be ignored as an element of construction;⁹ yet it achieved

¹ *Buchanan v. Angus*, 1862, 4 Macq. 374.

² 1847, 10 D. 166.

³ Cf. *Cathcart's Trs. v. Heneage's Trs.*, 1883, 10 R. 1205; *Aitken v. Munro*, 1883, 10 R. 1097.

⁴ *Playfair's Trs. v. Playfair*, 21 R. 836; *Steel's Trs. v. Steedman*, 1902, 5 F. 239; *Watson's Trs. v. Watson*, 1902, 4 F. 798.

⁵ *Anderson's Exr. v. Anderson's Trs.*, 1895, 22 R. 254; but see *Bryson's Trs. v. Bryson* (O.H.), 1919, 2 S.L.T. 303.

⁶ *Henderson's Trs. v. Henderson*, 1907 S.C. 43.

⁷ *Brown's Trs. v. Brown*, 1890, 18 R. 185; cf. *Galloway's Trs. v. Galloway*, 1897, 25 R. 28; *Kippen's Trs.*, 1889, 16 R. 668; *Peterkin v. Harvey* (O.H.), 1902, 9 S.L.T. 434.

⁸ Cf. *Hogg v. Hamilton*, 1877, 4 R. 845; *Sim v. Sim*, 1895, 22 R. 921.

⁹ *Fotheringham's Trs.*, 1873, 11 M. 848; *Nairn's Trs. v. Melville*, 1877, 5 R. 128.

nothing in favour of conversion where the trust had subsisted for fifty years and the beneficiaries ultimately entitled were fifty-two in number; for it is as easy to convey *uno ictu* to many persons heritage in equal shares as to divide the proceeds of it in money.¹ In the case of *Sheppard's Trs.*² the same reluctance to admit conversion without proved necessity for it was shewn by five judges out of the seven who heard the argument. There was a power of sale, but no direction to sell. The trustees were directed, on the death of the truster's widow, or on the majority of his youngest child, to divide the residue and to dispoise, convey, and make over and deliver it to the children and to the issue of predeceasers. The estate consisted of five heritable subjects, and there were five children. Prior to the date of distribution the trustees had not found it necessary to sell. The question was whether the shares of certain children who had predeceased the widow went to their heirs or to their executors; and the decision was that there had been no constructive conversion, and that the former claimants fell to be preferred. Again, it would probably be unsafe to rely implicitly on the distinction between heritage held as a family or residential estate, and therefore to be spared from division if possible, and heritage held merely as an investment, like stocks or shares, and to be treated like them in distributing the fee.³

1418. If there be an express direction to sell, the conversion takes place as soon as the direction becomes binding on the trustees.⁴ If there be only a power, it does not appear to be settled whether the conversion dates *a morte*, or from the time when sale is first seen to be necessary, or from the date of actual sale.

SECTION 5.—RECONVERSION.

1419. It is, of course, competent for a beneficiary who is *capax* to reconvert the estate so as to regulate his own succession by taking *in specie* from the trustees heritage which had not been sold, and would, but for the reconversion, have had to be treated as moveable.⁵

¹ *Duncan's Trs. v. Thomas*, 1882, 9 R. 731; *Auld v. Anderson*, 1876, 4 R. 24; but see *Campbell's Tr. v. Dick*, 1915 S.C. 100.

² *Sheppard's Trs. v. Sheppard*, 1885, 12 R. 1193.

³ See *Baird v. Watson*, 1880, 8 R. 233.

⁴ *M'Gilchrist's Trs. v. M'Gilchrist*, 1870, 8 M. 689.

⁵ *Grindlay v. Grindlay's Trs.*, 1853, 16 D. 27; *Hogg v. Hamilton*, 1877, 4 R. 845.

HERITABLE JURISDICTION.

See BARON; SHERIFF.

HERITABLE SECURITIES.

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SECTION 1.—DEFINITION.

1420. The phrase "heritable security" is defined in the Titles to Land Consolidation Act, 1868,¹ for the purposes of that Act, as including (s. 3) "all heritable bonds, bonds and dispositions in security, bonds of annualrent, bonds of annuity, and all securities authorised to be granted by s. 7 of 19 & 20 Vict. c. 91, and all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents and profits thereof, as well as such lands themselves and the rents and profits thereof, and the sums, principal, interest, and penalties secured by such securities, but shall not include securities by way of ground-annual, whether redeemable or irredeemable, or absolute dispositions qualified by back bonds or letters." The Conveyancing Act, 1874² (s. 3), followed in this respect by the Heritable Securities Act, 1894,³ adopts this definition, with the addition of real burdens and securities by way of ground-annual. It has been held that a security over a registered lease fell within the definition in the Consolidation Act, 1868,⁴ even although constituted by an absolute assignation with a back bond, on the ground that the exclusion of absolute dispositions

¹ 31 & 32 Vict. c. 101.

³ 57 & 58 Vict. c. 44.

² 37 & 38 Vict. c. 94.

⁴ *Stroyan v. Murray*, 1890, 17 R. 1170.

did not apply to other forms of *ex facie* absolute transfers,¹ and securities over leases are now included expressly in the interpretation clause (s. 2) of the Conveyancing (Scotland) Act, 1924.²

1421. A more general definition of the phrase "heritable security" may be taken from the opinion of Lord Rutherford Clark in the same case, to the effect that any security over a heritable subject is a heritable security. This must be qualified to the extent that a security which contains a formal conveyance of a heritable subject, but gives the creditor no right over that subject, and no means of acquiring any right over it by diligence, is not a heritable security. Thus harbour trustees borrowed money on mortgages expressed in a particular form, whereby the harbour and works were assigned to the creditor. It was held that, as the harbour and works were vested by the Legislature in a statutory body for public purposes, a private creditor could not attach them by diligence, and therefore that the mortgages in question were only personal obligations of the trust, and not real or heritable securities.³ A railway mortgage or debenture, however, issued under the Railway Companies (Scotland) Act, 1867,⁴ has been held to be a heritable security, in respect that although the railway could not be attached by ordinary diligence, it was open to the mortgagees or debenture holders to obtain the appointment of a judicial factor, whereby they might enter into possession of the subjects and might ultimately expose them to sale.⁵

SECTION 2.—EARLIER FORMS.

1422. The earlier forms of heritable security in Scotland were devised to evade the rule of the Canon law, which forbade as usury the taking of interest. Thus the direct disposition in security of a sum lent, with a fixed rate of interest, being impossible, the alternative forms of an annualrent secured upon land, and a wadset, were adopted. A very brief sketch of these conveyances may be given.

SUBSECTION (1).—*Bond of Annualrent.*

1423. The bond of annualrent was originally a purchase of a rent or annuity secured upon land. It was secured by infeftment, but not by any conveyance of the lands, and was thus of the nature of a real burden.⁶ The creditor was in the position of the holder of a *debitum fundi*, and was therefore entitled to poind the ground,⁷ but as the bond contained no disposition of the lands, it could not form a title for adjudication in implement.⁸ In its original form the bond of annualrent contained an obligation for payment of the rent, but no obligation

¹ *Stroyan v. Murray*, 1890, 17 R. 1170, per Lord Lee.

² 14 & 15 Geo. V. c. 27.

³ *Greenock Harbour Trs.*, 1888, 15 R. 343; *Hutton v. Annan*, 1898, 25 R. (H.L.) 23.

⁴ 30 & 31 Vict. c. 126.

⁵ *Breatcliff v. Bransby's Trs.*, 1887, 14 R. 307.

⁶ Menzies, Conveyancing, p. 845.

⁷ *Stair*, ii. 5, 8.

⁸ *Strachan v. Whiteford*, 1776, Mor. App. voce "Adjudication," No. 7, explained in *Watson v. Wilson*, 1868, 6 M. 258.

to repay the principal sum, and no right to insist on redemption, and was thus an absolute purchase of an annuity, and not a security. In process of time, however, a clause, known as a clause of requisition, giving the granter of the bond the right to redeem, was added, and the addition of a personal obligation for the principal sum advanced converted the bond of annualrent into the modern heritable bond. It is still, however, used in its original form under the Entail Acts.¹

SUBSECTION (2).—*Wadset*.

1424. The form of security known as a wadset was either proper or improper. "A proper wadset is, where the fruits and profits of the thing wadset are simply given for the annualrent of the sum, and the hazard or benefit thereof, whether it rise or fall, is the wadsetter's."² The addition of a back tack, securing the granter in the possession of the subjects, or of an obligation to account for the profits of the subjects, converted the security into an improper wadset, as the essential feature of the proper wadset was, that the creditor looked to obtain interest for his advance solely to the fruits or profits of the subject, and not to the personal obligation of the debtor. In a wadset, the creditor was known as the wadsetter—the debtor, in respect of his right of reversion, as the reverser. The security was constituted by an ordinary disposition of the lands to the wadsetter, usually with a holding *de me*, and was completed by infestment. The right of reversion was usually provided for in a separate deed, and the contract was thus a mutual one, in which the reverser conveyed the lands, and the wadsetter undertook to grant a right of reversion.³ A reversion was not binding on singular successors of the wadsetter until the Act 1469, c. 27, and its registration in the Register of Sasines and Reversions was first enacted by the Act 1617, c. 16. The wadset was declared redeemable by payment of the capital sum, at a time and place fixed in the reversion; if payment was refused, the lands might be recovered by a declarator of redemption.⁴ Such a declarator has been sustained at the instance of parties holding real burdens on the reversion, who alleged that the wadset had been extinguished by the wadsetter's intromissions with the rents.⁵ It is a point never definitely settled, whether the record could be cleared, on the redemption of a wadset, by a simple renunciation, or whether formal resignation was necessary.⁶

SECTION 3.—MODERN FORMS.

1425. The forms of heritable security in use in modern practice are the bond and disposition in security, the absolute disposition with

¹ 38 & 39 Vict. c. 61, s. 8; 41 & 42 Vict. c. 28, s. 3.

² Stair, ii. 10, 9.

³ Dallas, Styles, p. 709.

⁴ Menzies, Conveyancing, p. 848.

⁵ *Wright v. Turner*, 1855, 17 D. 629.

⁶ *Duke of Roxburgh v. Wauchope*, 1825, 1 W. & S. 41.

back bond, and the real or reserved burden. The first two forms are constituted by direct conveyance of the lands, redeemably in the one case, absolutely in the other; the last contains no disposition of the lands, but is constituted as a burden on the right of a party to whom they are conveyed. The form of security known in England as an equitable mortgage, by which the pledge of the title-deeds of an estate confers on the pledgee the rights of a security holder over that estate, is not recognised in Scotland, and, if adopted, would not confer upon the pledgee any right which would be available against the singular successors of the pledgor, or against his general creditors.¹ It is not proposed here to enter into a discussion of the details of the various forms of security, which are dealt with under their respective heads. See ABSOLUTE DISPOSITION; BOND; BURDENS.

SECTION 4.—CAPACITY TO GRANT.

1426. As a general rule, any person who is in possession of heritable property, and is capable of contracting, may grant a heritable security. A pupil cannot himself burden his lands; his tutor, who has the powers conferred on trustees by the Trusts Acts,² may now do so without applying for authority to the Court.³ A minor, with curators, requires their consent,⁴ and it is doubtful whether a security by a minor without curators would be valid.⁵ To grant a heritable security is now one of ordinary powers of a trustee.⁶ A married woman no longer requires the consent of her husband since the statutory abolition of his *jus administrationis*.⁷

1427. The power of a corporation holding heritable property to grant a heritable security would seem to depend on whether it has power to borrow, and whether the heritable property in question is or is not dedicated to public uses. A trading company has the power to borrow if such an act is within the ordinary scope of its business, and not forbidden in the memorandum or articles of association.⁸ The borrowing powers of companies under particular statutes, or under the Companies Clauses Acts, depend on, and are limited by, the statute by which the company is incorporated, and any borrowing beyond those limits is *ultra vires* and will not form a binding debt.⁹ A royal burgh has the power to borrow and to alienate its heritable property, and therefore has probably the power to grant heritable securities.¹⁰ Much of the

¹ *Christie v. Ruxton*, 1862, 24 D. 1182.

² Guardianship of Infants Act, 1925 (15 & 16 Geo. V. c. 4).

³ *Dempster, Petr.*, 1926, S.L.T. 157.

⁴ Bell's Prin., s. 2096.

⁵ Per Lord Pres. Inglis in *Hill v. City of Glasgow Bank*, 1879, 7 R. 68.

⁶ Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 3.

⁷ Fraser, H. & W. i. 814; More, Notes to Stair, xvii.; *Boyle v. Crawford*, 1822, 1 S.

372; Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 1.

⁸ *Blackburn Society v. Cunliffe Brooks & Co.*, 1885, 29 Ch. D. 902; and see *Bateman v. Mid Wales Rly. Co.*, 1876, L.R. 1 C.P. 499.

⁹ *Wenlock v. River Dee Co.*, 1885, 10 App. Cas. 354; *Blackburn Society*, *supra*.

¹⁰ *Royal Burgh of Renfrew v. Murdoch*, 1892, 19 R. 822.

heritable property of a burgh, however, is of a kind destined to public uses, such as parks and public buildings, and a security purporting to convey such subjects would be ineffectual, inasmuch as they are not open to the diligence of private creditors.¹ Even over subjects which are not public, but which form a source of revenue to the burgh, a security would be reducible, as contrary to the fundamental principles of burgh administration, if it were granted for an inadequate consideration.² Local authorities, such as a county council or parish council, are usually authorised to borrow money on the security of the rates:³ and it would seem very doubtful whether they have any implied power to grant a heritable security in the event of their possessing heritable property.

SECTION 5.—TITLE TO GRANT.

1428. Any interest in heritable property may be made the subject of a security. Thus a bond may be granted by a superior over the *dominium directum*,⁴ by the creditor in an existing heritable security,⁵ or by a leaseholder. Where, however, the title of the granter is either limited, as in the case of an heir of entail, or incomplete, as in the case of land held on a personal title, special forms of security, or special procedure on completing the security, have to be adopted.⁶

SECTION 6.—SECURITIES UNDER ENTAIL.

1429. Apart from the relaxations in the fetters of a strict entail contained in the entail statutes, an heir in possession could grant a security over his own liferent interest,⁷ but was unable to affect the fee, except under a special provision in the particular entail.⁸ By the Aberdeen Act⁹ and subsequent statutes¹⁰ an heir of entail is entitled to burden the fee by granting, under the authority of the Court, an ordinary bond and disposition in security, in order to secure provisions for his wife and children. Under 31 & 32 Vict. c. 84, s. 11, entailer's debt's, *i.e.* debts for which the estate is liable to be adjudged, may be charged in the same way as children's provisions. Under the Montgomery Act¹¹ and subsequent statutes¹² an heir of entail in possession, who has expended money in certain improvements on the estate, may obtain the authority of the Court to execute either (a) a bond of annual-

¹ *Sanderson v. Lees*, 1859, 22 D. 24; *Greenock Harbour Trs.*, 1888, 15 R. 343.

² Per Lord Justice-Clerk Boyle in *Mags. of Selkirk v. Clapperton*, 1828, 6 S. 955.

³ 52 & 53 Vict. c. 30, s. 57; 57 & 58 Vict. c. 58, s. 28.

⁴ *Campbell v. Bertram*, 1865, 4 M. 23.

⁵ *Stein's Creditors v. Newnham, Everett & Co.*, 1793, Mor. 14127.

⁶ See COMPLETION OF TITLE, Vol. IV, p. 168, *ante*.

⁷ *Nairne v. Gray*, 15th February 1810, F.C.

⁸ *Duchess of Richmond v. Duke of Richmond*, 1837, 16 S. 172. ⁹ 5 Geo. IV. c. 87.

¹⁰ 31 & 32 Vict. c. 84, s. 6; 38 & 39 Vict. c. 61, s. 10; 11 & 12 Vict. c. 36, ss. 21, 23, 33; 16 & 17 Vict. c. 94, s. 23.

¹¹ 10 Geo. III. c. 51.

¹² 38 & 39 Vict. c. 61, ss. 7, 8; 41 & 42 Vict. c. 28, s. 3; 45 & 46 Vict. c. 53, ss. 5, 6.

rent at the rate of £7, 2s. for each £100 expended for twenty-five years,¹ or (b) a bond and disposition in security for three-fourths of the sum expended. Under the Finance Act, 1894,² the amount paid on succession as estate duty may be made a charge on the entailed estate.³ Under the Rutherfurd Act,⁴ and the Entail Act, 1882,⁵ power is given to every heir of entail to burden his estate on obtaining the same consents, if any, as would entitle him to disentail. These depend on whether the heir was born before or after the date of entail. See ENTAIL.⁶ In every case in which a security affecting the fee of the estate is granted by an heir of entail, the authority of the Court must be obtained by petition. Any judgment of the Court authorising any instrument of disentail, disposition, or bond and disposition in security, if not brought under review by appeal to the House of Lords, and if no action of reduction has been brought during the two years during which such an appeal is competent, is no longer, as regards third parties dealing *bona fide* on the faith thereof, reducible on the ground of any irregularity or non-compliance with the provisions of the entail statutes.⁷

SECTION 7.—SECURITIES GRANTED ON INCOMPLETE TITLE.

SUBSECTION (1).—*Granter with only Jus crediti.*

1430. The granter of a heritable security may be a person who holds lands on a *jus crediti*, without any formal or valid title. This may occur if the security is granted while the granter's title rests merely on missives of sale, or is merely a right to demand a conveyance from trustees, or is open to some objection which is fatal to his feudal title without interfering with his personal right to the lands.⁸ The effect of a security granted in any of these circumstances is to place the creditor in the position of an assignee of a *jus crediti*, or personal obligation, but not to give him a real right over the lands. His security may be completed, in a question with the granter, his creditors or anyone deriving right from him, either by registration of the bond in the Register of Sasines or by intimation to the party or parties who are debtors in the *jus crediti*.⁹ He then is placed in the position of the holder of an intimated assignation. He is, however, exposed to the danger that his right may be excluded by a subsequent disposition granted by the person infeft in the lands, which, if duly made real by infeftment, would be preferable to the right of the granter of the security, and therefore to that of the security holder.¹⁰ In such cases the security may be completed either by the completion of the title of the granter, which

¹ *Stewart, Petr.*, 1898, 36 S.L.R. 623.

² 57 & 58 Vict. c. 30.

³ *Laurie, Petr.*, 1898, 25 R. 636.

⁴ 11 & 12 Vict. c. 36, s. 4.

⁵ 45 & 46 Vict. c. 53, s. 4.

⁶ Vol. VI. p. 195, *ante*.

⁷ 16 & 17 Vict. c. 94, s. 24; 45 & 46 Vict. c. 53, s. 29; *Viscount Fincastle v. Earl of Dunmore*, 1876, 3 R. 345.

⁸ *Strachan v. Whiteford*, 1776, Mor. App. voce "Adjudication," No. 7; *Edmond v. Gordon*, 1855, 18 D. 47; *affd.* 1858, 3 Macq. 116; *Paul v. Boyd's Trs.*, 1835, 13 S. 818.

⁹ *Edmond v. Gordon*, *supra*.

¹⁰ *Calder v. Stewart*, 1806, Hume 440.

will accresce to the title of the grantee,¹ or by an action of adjudication in implement, directed against the person last infeft in the lands.²

SUBSECTION (2).—*Granter holding Personal Right.*

1431. Again, the granter of a heritable security may be the holder of a personal right to lands, *i.e.* he may have a right to take infeftment but not have done so. The distinction between this case and the one above considered is that the holder of a personal right can take infeftment without the intervention of any third party, while the holder of a *jus crediti* requires a conveyance, voluntary or judicial, from the person who is debtor therein. The ordinary cases of securities granted on a personal right arise when the granter has a disposition in his favour, on which he has not taken infeftment, or where he is an heir who has not made up a title, but possesses on the personal right conferred by s. 9 of the Conveyancing Act, 1874. In such cases the security holder is exposed to a double risk. His right may be excluded by a disposition granted by the party infeft in the lands,³ or by a conveyance subsequently granted by the granter of the security, but made real before it.⁴ The defect in the title of the security holder may be cured either by accretion, if the title of the granter of the security is completed,⁵ or by recording in the appropriate Register of Sasines a notice of title under the provisions of s. 4 of the Conveyancing (Scotland) Act, 1924.

SUBSECTION (3).—*Reduction of Title of Granter.*

1432. The reduction of the title of the granter of a heritable security does not necessarily avoid the right of the creditor. If a party holds land on a title which is good on the face of the records, it would appear that a heritable security granted by him for onerous causes, and duly made real, would form a valid burden on the lands, even although the title of the granter were ultimately reduced on some latent ground.⁶ The principle of these cases would not hold if the title of the granter were actually under challenge at the date of the granting of the security,⁷ or, probably, if the title of the granter were an absolute nullity, as, for instance, if it were founded on a forged deed.⁸ And if the title of the granter was subject to an objection which a proper search would have disclosed, the security will be avoided on that title being reduced. Thus, in a recent case, a testator disposed lands to A., subject to the provision that "in the event of A. dying without leaving any male heir of his body" the lands should revert back to B. A. never made up any title

¹ *Swan v. Western Bank*, 1866, 4 M. 663; *Smith v. Wallace*, 1869, 8 M. 204.

² *M'Gregor v. Macdonald*, 1843, 5 D. 888; *Watson v. Wilson*, 1868, 6 M. 258.

³ *Calder v. Stewart*, 1806, Hume 440; Bell's Prin. s. 772.

⁴ *Auchincloss v. Duncan*, 1894, 21 R. 1091; see *Bell v. Gartshore*, 1737, Mor. 2848; 2 Ross's L.C. 410 (Adjudger).

⁵ *Glassford's Exrs. v. Scott*, 1850, 12 D. 893; *Smith v. Wallace*, 1869, 8 M. 204.

⁶ *Heron v. Stewart*, 1749, 3 Ross's L.C. 243; *Calder v. Stewart*, *supra*.

⁷ *Wauchope v. Ferrier*, 1817, 3 Ross's L.C. 259.

⁸ See Lord Kilkerran's note to *Heron*, *cit.* in 3 Ross's L.C. at p. 248.

under the disposition, but, during his lifetime, B. expedite and recorded a notarial instrument thereon, which was registered on his behalf "in eventual fee." This title was reduced at the instance of the testamentary trustees of A., and, in a question as to the position of a lessee under a lease granted by B., it was pointed out by Lord Trayner, that as B.'s title was defective on the face of it, no real right granted by him could affect the lands after his title was reduced.¹

SECTION 8.—INTERNATIONAL LAW.

1433. The question as to the position in international law of heritable securities in Scotland is not directly settled by any Scottish decision. But there can be no doubt that the effect of a security, as a real right in land, must be determined by the *lex loci rei sitæ*, and therefore that a question as to a heritable security over heritage in Scotland would be decided by Scots law, even although the granter or grantee, or both of them, were domiciled abroad.² Similarly, where an English company issued obligations purporting to charge heritable property situated in Florence, it was held that the validity of these charges must be determined by Italian law.³

SECTION 9.—HERITABLE SECURITIES IN COMPETITION WITH OTHER RIGHTS.

SUBSECTION (1).—*Heritable Securities inter se.*

1434. In a question between two securities over the same subject, the criterion of preference is not the date of granting, or the form of the security, but the date at which infeftment is taken, or, in modern practice, the date at which the disposition constituting the security, or a notarial instrument upon it, is recorded in the Register of Sasines.⁴ For the special rules in the case where the subject of the security is a lease, see LEASE. The fact that a security may be granted in the form of an absolute disposition is immaterial in a question with other heritable creditors, as, in a question with such creditors, the rights and liabilities of such a disponent are those of a creditor.⁵ Among other rights over land with which a heritable security may be brought into competition, those of importance are—(1) public burdens; (2) feu-duty; (3) terce; (4) rights acquired by diligence.

SUBSECTION (2).—*Public Burdens.*

1435. The rights of a heritable creditor in the subjects conveyed to him are not affected by the fact that the debtor has failed to pay rates

¹ *Reid's Tr. v. Watson's Trs.*, 1896, 23 R. 6363.

² *Cp. Mackintosh v. May*, 1895, 22 R. 345 (Lease); *Mead v. Anderson*, 1830, 4 W. & S. 328 (Will sufficient to carry heritage).

³ *Norton v. Florence Land Co.*, 1877, 7 Ch. D. 332.

⁴ *Stair*, iii. 1, 21; *Ersk.* ii. 3, 48; *Act 1617*, c. 16; 31 & 32 Vict. c. 101, s. 120.

⁵ *Liqrs. of City of Glasgow Bank v. Nicolson's Trs.*, 1882, 9 R. 689.

or taxes charged upon him in respect of his ownership of the subjects. Such rates and taxes are personal debts, not *debita fundi*.¹ If, however, the heritable creditor has executed a poinding of the ground, his rights are affected by a provision in s. 7 of the Revenue Act, 1884.² That section provides, in effect, that anyone taking the moveable property of a debtor by any diligence whatsoever, shall be liable to pay all Crown taxes for the current year. And certain rates, *e.g.* poor and school rates, are by statute placed, in this respect, in the same position as Crown taxes. Such rates are therefore preferable to the rights acquired by a heritable creditor by poinding the ground.³ But a mere provision that a particular rate is to be "preferable to all debts of a private nature" will not make that rate preferable to the right of the heritable creditor, who, in carrying out a poinding of the ground, is merely putting in force a right inherent in his infetment in a *debitum fundi*, and not acquiring a preference by diligence.⁴

SUBSECTION (3).—*Rights of Superior.*

1436. Feu-duty and the casualty of relief are burdens on land preferable to any heritable security.⁵ The casualty of composition, if taxed and expressly stipulated, is a *debitum fundi*, and thus preferable to all real rights subsequently granted; but it is still doubtful whether an untaxed composition can be regarded as more than a personal obligation of the vassal.⁶ A stipulation for an increase of the feu-duty at certain fixed periods, under s. 23 of the Conveyancing Act, 1874, doubtless creates a *debitum fundi*, and is preferable.

SUBSECTION (4).—*Widow's Terce.*

1437. The real right of a heritable creditor cannot be brought *in computo* with terce; that is, the creditor cannot uplift the rents of the subjects affected by the terce and apply them in reduction of his debt or interest, except to the extent of one-third of the interest, for which the widow is liable.⁷ He has a title to bring a declarator for the ascertainment and for the redemption of the terce.⁸

SUBSECTION (5).—*Adjudger.*

1438. An adjudger ranks with a heritable creditor according to the dates of their respective infetments.⁹ At common law, however, it was held that the raising of an action of adjudication rendered the subjects litigious, with the effect that no infetment taken after the raising of

¹ *Argyll County Council v. Walker*, 1909 S.C. 107; 16 S.L.T. 575.

² 47 & 48 Vict. c. 62.

³ *Campbell v. Edinburgh Parish Council*, 1911 S.C. 280.

⁴ *Campbell, supra*; *Greenock Board of Police v. Greenock Property Investment Co.*, 1885, 12 R. 832; *Anderson's Trs. v. Donaldson Co.*, 1908 S.C. 38; 15 S.L.T. 409.

⁵ Ersk. ii. 5, 50.

⁶ *Stewart v. Gibson's Tr.*, 1880, 8 R. 270.

⁷ *Belschier v. Moffat*, 1780, Mor. 15863; *Black's Trs. v. Scott*, 1895, 3 S.L.T. 8.

⁸ Conveyancing (Scotland) Act, 1924, s. 21, c. 3.

⁹ *Stair*, iv. 35, 8.

the action could rank before the adjudger's right, provided that there was no undue delay in the completion of the diligence.¹ For this rule the Consolidation Act, 1868 (s. 159), has substituted a provision whereby an adjudger can render the subjects litigious by recording in the General Register of Inhibitions a notice, in the form of the Schedule RR of the Act of the signeted summons of adjudication, without which the action has now no effect in rendering the subject litigious. The Conveyancing (Scotland) Act, 1924, provides (s. 44 (2)) that such notices should be registered in the Register of Inhibitions and Adjudications, as established by the Act, and that they prescribe and are of no effect five years after registration (s. 44 (3) (a)). In no case shall litigiosity be pleadable or be founded on to any effect after the expiry of six months from and after final decree is pronounced in the action creating such litigiosity (s. 44 (3) (a)). A more complicated question of preference arises when two or more adjudications are led, and a heritable security is completed after the first but before the others. By the Act 1661, c. 62, all adjudications led before that first made effectual, and all led within a year and a day thereafter, rank *pari passu*. See ADJUDICATION.² The difficulty which arises in ranking a heritable creditor and two adjudgers, who *inter se* rank *pari passu*, but of whom one is preferable and the other postponed to the heritable security, has been solved as follows:—The prior adjudger is ranked for his whole debt in preference to the heritable creditor, who is then ranked on the balance in preference to the second adjudger; the second adjudger is then entitled to draw from the ranking of the first adjudger the amount by which that ranking exceeds what it would have been had the heritable security never existed, and the question been one with adjudgers alone.³

SUBSECTION (6).—*Inhibition.*

1439. An inhibition strikes at all heritable securities afterwards granted by the party against whom it is used, unless the subject of the security is acquired after the inhibition is used.⁴ The date of an inhibition is the date at which it is registered in the General Register of Inhibitions, unless, before or after its execution, a notice is registered in that Register, when, if the inhibition and the execution thereof are duly registered within twenty-one days from the date of the registration of the notice, that date is held to be the date of the inhibition.⁵ The inhibition strikes at all voluntary real rights granted after its date to the effect of entitling the inhibitor to reduce the real right in question, so far as he is prejudiced thereby, *ex capite inhibitionis*.⁶ It does not

¹ Stair, iv. 35, 17; Wallace v. Barclay, 1736, 1 Ross's L.C. 3228; Duchess of Douglas v. Scott, 1764, 1 Ross's L.C. 233.

² Vol. I. p. 117, *ante*.

³ Bell, Com. ii. 404; Binning v. Auchinbreck, 1747, 1 Ross's L.C. 248; Chalmers v. Cunningham, 1737, 1 Ross's L.C. 253.

⁴ Consolidation Act, 1868, s. 157.

⁵ *Ibid.*, s. 155, Sched. PP.

⁶ Stair, iv. 50; Bell's Prin., s. 2310.

however, strike at a security granted before its date but completed after it, or, probably, at a security granted after the inhibition in pursuance of a prior obligation to grant it.¹ Inhibition used against the creditor in a bond does not preclude him from accepting payment from the debtor, and, at his request, assigning the land to a third party.² When there are several heritable securities affected by a prior inhibition, the burden of the inhibitor's right falls entirely on the security which is lowest in the ranking.³ Questions of some complication have arisen in cases where the rights of inhibitors, adjudgers, and heritable creditors over the estate of the common debtor have come into conflict. The canons of ranking in such circumstances will be found drawn out by Bell⁴ in terms which have received the approval of the Court.⁵

SECTION 10.—HERITABLE SECURITIES IN DEBTOR'S SUCCESSION.

1440. On the death of the debtor in a heritable security, his whole estate, heritable and moveable, is liable to the creditor, who is not bound to discuss the heir before proceeding against the executor.⁶ The liability of an executor is limited by the value of the estate to which he confirms;⁷ of an heir, by the value of the estate to which he succeeds;⁸ of a disponee or legatee, by the value of the estate disposed or left to him.⁹ The personal obligation in any heritable security (not including a security by *ex facie* absolute disposition) transmits against any person taking the estate by succession, gift, or bequest, and forms a burden on his title in the same way as it did on that of his ancestor or author.¹⁰ Sec. 47 is not applicable unless the heir or legatee has made up a title to, or taken possession of, the subjects;¹¹ and summary diligence is not competent unless the heir or legatee has executed an agreement to the transmission of the obligation.¹² If, however, a creditor elects to proceed against heirs, he must discuss them in a certain order. The heir who succeeds to the particular subject, or is burdened with the obligation, must be discussed before calling on the heir-at-law, and, under a settlement in favour of heirs-male, the heir of line must be discussed before the heir-male.¹³

1441. In a question between the representatives of the debtor, on intestacy, the burden of the heritable security must be borne by the

¹ *Livingston v. Macfarlane*, 1842, 5 D. 1.

² *Mackintosh's Trs. v. Davidson & Garden*, 1898, 25 R. 554.

³ *Creditors of Langton*, 1760, Mor. 6995.

⁴ Com. ii. 413.

⁵ *Baird and Brown v. Stirrat's Tr.*, 1872, 10 M. 414; see *Scottish Wagon Co. v. Hamilton's Trs.*, 1906, 13 S.L.T. 779; *Duke of Hamilton's Trs. v. Hamilton's Tr.*, 1906, 13 S.L.T. 780.

⁶ *M'Gillivray's Exrs. v. Musson*, 1857, 19 D. 1099.

⁷ *Renton v. Renton*, 1851, 14 D. 35.

⁸ Conveyancing Act, 1874, s. 12.

⁹ *Bruce v. Bruce*, 1826, 5 S. 119; *Welch's Exrs. v. Edinburgh Life Insurance Co.*, 1896, 23 R. 772.

¹⁰ Conveyancing Act, 1874, s. 47; and see *Lamb v. Field*, 1889, 27 S.L.R. 242; *Welch's Exrs.*, *supra*.

¹¹ *Fenton Livingstone v. Crichton's Trs.*, 1908 S.C. 1208.

¹² Conveyancing (Scotland) Act, 1924, s. 15 (2).-

¹³ Ersk. iii. 8, 52.

heir, and the executor, on payment, is entitled to relief.¹ Premonition of payment given before the death, however, probably makes the burden fall on the executor.² The mere fact that the subjects of the security are insufficient to meet the debt, or that the security would, in a question with other creditors, be reducible, does not relieve the heir;³ but the question may still be open, whether the granting of a heritable security as an additional safeguard to a large debt primarily secured over moveable property will render the whole debt heritable and a burden on the heir.

1442. In testate succession, a direction, or a distinct evidence of intention, as to the estate from which a heritable debt should be paid, will render it a burden on that estate,⁴ but the general rule is that the disponee of the estate subject to the burden is liable for it, even if there is a general direction to executors to pay all debts.⁵ When two estates are burdened with a bond, and are left to different disponees, the burden of the bond must be borne rateably, according to the value of the estates, under deduction of any charge preferable to the bond which may happen to affect either estate.⁶

SECTION 11.—SUCCESSION TO CREDITOR.

1443. In the succession of the creditor, heritable securities, including real burdens,⁷ and securities over leases,⁸ but not including an absolute disposition with a back bond,⁹ are now moveable.¹⁰ They are still, however, heritable in successions opening before 31st December 1868;¹¹ where the security is expressly taken in favour of executors; and in regard to questions of legitim, taxation, rights of courtesy and terce, *jus mariti* and *jus relictæ*.¹² It has been held that heritable securities fell under a *mortis causa* disposition of moveable estate,¹³ but that a heritable security to which a wife succeeded as next-of-kin of the creditor did not fall under the *jus mariti* of her husband.¹⁴ A security in which executors are not excluded may be rendered heritable—(a) where the bond or a notarial instrument thereon is recorded in the Register of Sasines, by recording a minute in the form of Schedule DD of the Consolidation Act; and (b) where neither the bond nor a notarial instrument thereon is recorded, by indorsing a minute in the form of Schedule DD on the bond, and recording it with that indorsation in the Register

¹ Ersk. iii. 9, 48; *Duncan*, 1883, 10 R. 1042.

² *Earl of Minto v. Elliott*, 1825, 1 W. & S. 678.

³ *Bell's Tr. v. Bell*, 1884, 12 R. 85.

⁴ *Macleod's Trs.*, 1871, 9 M. 903.

⁵ *Fraser v. Fraser*, 1804, Mor. App. "Heir and Executor," No. 3; affd. 3 Pat. 642; *Douglas's Tr. v. Douglas*, 1868, 6 M. 223.

⁶ *Ferrier v. Cowan*, 1896, 23 R. 703.

⁷ Conveyancing Act, 1874, s. 30.

⁸ *Stroyan v. Murray*, 1890, 17 R. 1170.

⁹ Consolidation Act, 1868, s. 3.

¹⁰ *Ibid.*, s. 117.

¹¹ *Brown v. Macdonald*, 1870, 8 M. 439.

¹² Consolidation Act, 1868, s. 117; see *Hare*, 1889, 17 R. 105; *Train v. Train's Exrs.*, 1899, 2 F. 146.

¹³ *Guthrie*, 1880, 8 R. 34.

¹⁴ *Hodge v. Hodge*, 1879, 7 R. 259.

of Sasines.¹ The exclusion of executors, whether effected in the bond or by minute, may be removed either by the creditor recording a minute in the form of Schedule EE of the 1868 Act in the Register of Sasines, or by his assigning, conveying, or bequeathing the bond to himself or any other person, without repeating the exclusion of executors, when the bond becomes moveable on such assignation, etc., taking effect.¹

SECTION 12.—POSITION OF CREDITOR IN CONTRACTS MADE BY DEBTOR.

1444. The rights and remedies of the creditor in a heritable security depend largely upon the form of security adopted, and are treated of under the headings ABSOLUTE DISPOSITION;² BOND;³ and BURDENS.⁴ The more general question as to the position of the creditor in regard to contracts entered into by the debtor with relation to the subjects may be discussed here. The general principle would seem to be, that the debtor, so long as he is allowed to remain in possession, is entitled to carry on the ordinary management of the subjects, and that his acts of ordinary management, such as the granting of leases, will be binding on the creditor.⁵ But the creditor is not bound by, or entitled to enforce, contracts relating to the subjects which fall outside the ordinary powers of management, and to which he was not a party. Thus a debtor, in feuing part of lands which were subject to a security, undertook certain personal obligations in the nature of building restrictions with regard to the part still unfeued. It was held that these were not binding on a purchaser from the heritable creditor, and the opinion was indicated that it was more than doubtful whether they would have been binding even if they had been expressed as conditions of the feu rights.⁶ Conversely, the opinion has been expressed, that if the debtor enters into a contract of sale of the subjects and allows the purchaser to resile, the creditor has no title to insist on the fulfilment of the contract of sale.⁷ And where the proprietor of bonded subjects entered into a contract with a neighbouring proprietor, whereby each undertook certain obligations with a view to making a private access to the subjects, and failed to perform his part of these obligations, it was held that the creditor had no title to oppose an action of reduction of the contract at the instance of the neighbouring proprietor.⁸

1445. These principles make it important, in arranging a bond or other security over property which it is proposed to feu, to reserve power to the debtor to feu, and to take the creditor bound to restrict his security to the feu-duty, and also to consent to an allocation thereof.⁹

¹ Consolidation Act, 1868, s. 117.

² Vol. II. p. 300, *ante*.

³ Vol. I. p. 3, *ante*.

⁴ Vol. II. p. 425, *ante*.

⁵ *Edinburgh Entertainments Co. v. Stevenson*, 1926 S.C. 363. As to leases with exceptional clauses, see *Reid v. M'Gill*, 1912, 2 S.L.T. 246; *Mackenzie v. Imlay's Trs.*, 1912 S.C. 685.

⁶ *Morier v. Brownlie & Watson*, 1895, 23 R. 67.

⁷ *Smith v. Soeder*, 1895, 23 R. 60.

⁸ *Heron v. Martin*, 1893, 20 R. 1001.

⁹ Bell, *Convey.* 1177; *Juridical Styles*, 6th ed., i. 246.

In the absence of any express provision a debtor has no power to feu subjects over which he has granted a security, unless he obtains the creditor's consent.¹ The right to challenge a feu unauthorised by the creditor, or not in accordance with the terms on which the right to feu is reserved, passes to the purchaser in the event of a sale by the creditor under the power in his bond.² On the part of the creditor, care should be taken that the debtor is precluded from entering into any contract with the feuars which would give the latter the right to retain the feu-duty in case of non-fulfilment, as such a right of retention would be as effectual in a question with the creditor as with the debtor. Thus, a bond was granted under reservation of power to feu, and the creditor was taken bound to restrict his security to the feu-duty; in granting the feus, the debtor undertook to lay out certain streets and drains, but became bankrupt without fulfilling these obligations; it was held that the feuars, in a question with the creditor in the bond, were entitled to retain the feu-duty until these obligations were fulfilled.³ A creditor has no title to sue on the contract between the debtor and his superior, and therefore cannot insist on an allocation of feu-duty.⁴

SECTION 13.—CATHOLIC AND SECONDARY SECURITIES.

1446. Where a party has granted to one creditor a right in security over two or more subjects, and to another creditor a postponed right over one of these subjects, these rights are known as catholic and secondary securities, and the holders thereof as catholic and secondary creditors. The rights and obligations of parties in this position may be dealt with under two heads: (1) Where there is only one secondary security; (2) where there are two or more secondary securities.

SUBSECTION (1).—*Where only One Secondary Security.*

1447. Where two estates are burdened by a prior bond covering both and a postponed bond covering one of them, the prior or catholic creditor is bound to have regard to the interest of the postponed or secondary creditor, and to exercise his rights so as to leave the largest possible margin for the postponed security. This obligation does not prevent him, while the debtor remains solvent, from freeing one subject of his security, even if the result of such release is that his whole debt rests upon the estate over which the secondary bond extends.⁵ But it controls him in the exercise of his remedies for the recovery of his debt. He is under the obligation to exercise his rights in the way least prejudicial to the interests of the secondary creditor. As a rule, therefore, he is bound to take payment out of the estate over which the secondary bond does not extend, and to rank on the other estate only

¹ *Soues v. Mill*, 1903, 11 S.L.T. 98; *Alston v. Nellfield Manure Co.*, 1915 S.C. 912.

² *Cumming v. Stewart*, 1928 S.C. 296. ³ *Arnott's Trs. v. Forbes*, 1881, 9 R. 89.

⁴ *Campbell v. Deans*, 1890, 17 R. 661. ⁵ *Morton, Liddell's Curator*, 1871, 10 M. 292.

for the balance of his debt, so far as it still may remain unpaid.¹ He has, however, the alternative of realising the estate over which the secondary security extends, and granting to the secondary creditor assignation of his prior right over the other estate.² The sequestration of the debtor does not affect the situation, as the interest of the trustee in the sequestration is not equivalent to a competing secondary right.³

SUBSECTION (2).—*Where Two or More Secondary Securities.*

1448. If both the estates over which the catholic security extends are burdened with secondary securities, the obligations of the catholic creditor are altered. His duty is then to draw his debt rateably from each estate, so that the burden of the catholic debt should not fall unfairly upon either of the secondary creditors.⁴ Or he may effect the same result by drawing his whole debt out of one estate, and assigning to the holder of the secondary bond over that estate his preferable right over the other estate to the extent of the share of the catholic debt which that estate should have borne. In estimating the rateable contribution which each estate should bear, its value is to be taken subject to the deduction of any burden, preferable to the catholic debt, which may happen to affect it.⁵ The actual working of these rules may be shewn by an example. If there is a catholic bond for £1000 secured over the estate of A. worth £2000, and the estate of B. worth £1000, and both estates are burdened with secondary securities, the estate of A. ought to bear £666, 13s. 4d. of the catholic debt, and the estate of B. £333, 6s. 8d. The catholic creditor may, if he chooses, draw his debt from these estates in these proportions. But it will often be more convenient for him to realise one estate only, and draw his whole debt from that. Supposing he chooses to draw his whole debt from the estate of B., and thereby to exhaust that estate, the secondary creditor on B. has no title to prevent this, but will be entitled to an assignation of the preferable security over A. to the extent of £666, 13s. 4d., and will therefore, to that extent, become a preferable creditor over A.

SUBSECTION (3).—*Analogous Cases.*

1449. These rules apply to other cases besides that of secondary bonds, and are applicable wherever there are secondary interests in the different estates over which the catholic security extends. Thus if one estate is burdened with a postponed bond, and the other estate is sold to a third party, the burden of the catholic debt must be apportioned

¹ Bell, Com. ii. 417; *Littlejohn v. Black*, 1855, 18 D. 207; *Nicol's Tr. v. Hill*, 1889, 16 R. 416.

² *Goldie v. Bank of Scotland*, 1834, 12 S. 498; *Littlejohn*, *supra*, per the Lord President at p. 213.

³ *Littlejohn v. Black*, *supra*.

⁴ Ersk. ii. 12, 66; Bell, Com. ii. 477; *Menzies v. Clark*, 1766, Mor. 3378; *Ferrier v. Cowan*, 1896, 23 R. 703.

⁵ *Ferrier v. Cowan*, *supra*.

rateably. On the same principle, if two estates burdened by a security pass to a different series of heirs, the burden must be borne rateably.¹ And if one creditor has attached the whole estate of his debtor by diligence, and another creditor has attached a part, the holder of the universal diligence must draw his debt in the way least prejudicial to the holder of the more limited right.² But the rules as to catholic and secondary securities do not apply where one of the estates over which the catholic security extends belongs to a cautioner for the debt. Thus if A. has a security over two estates, X. and Y., and X. is burdened by a second bond while Y. belongs to a cautioner, the second bondholder on X. cannot insist on the catholic debt being apportioned rateably, because the cautioner is only subsidiarily liable, and, if called upon to pay, is entitled to an assignation of the securities held by the creditor.³

SUBSECTION (4).—*Rules do not Apply where Catholic Creditor has an Opposing Interest.*

1450. A catholic creditor is not bound by the rules above explained if they conflict with any legitimate interest of his own. Thus if, besides the catholic debt, he has a postponed debt over one of the estates he is entitled to satisfy his catholic debt so as to free the estate over which his second bond extends, even if the other estate is burdened by a postponed bond in favour of another party.⁴ And in one case it has been held that if there existed a catholic bond over two estates, and secondary bonds over each estate, the catholic creditor was entitled to acquire one of the secondary bonds, and thereafter to realise his catholic debt so as to free the estate over which the bond he had acquired extended, even although the result might be that the other secondary creditor was entirely deprived of his security.⁵

SECTION 14.—EXTINCTION OF HERITABLE SECURITY.

1451. A heritable security should be extinguished by formal redemption, the exact manner depending on the form of security. But as the security is a mere accessory to a debt,⁶ it may also be extinguished by that debt ceasing to exist. Payment of the debt for which the security is granted will extinguish it in a question with the granter, his representatives, or his trustee in bankruptcy.⁷ In a question with an assignee

¹ *MacKenzie v. MacKenzie*, 1847, 9 D. 836; *Ferrier v. Cowan*, *supra*.

² *Butter v. Riddell*, 1790, Bell's Oct. Cas. 154; cp. *Nicol's Tr. v. Hill*, 1889, 16 R. 416.

³ *Grant v. Mansfield, Ramsay & Co.*, 1779, Mor. 1384; *Stewart v. Maxwell*, 11th January 1814, F.C.; cp. *Sligo v. Menzies*, 1840, 2 D. 1478.

⁴ *Ersk. ii. 12, 66; Pitcairn v. Haliday*, 1710, Mor. 3371; *Preston v. Erskine*, 1715 Mor. 3376.

⁵ *Scotland v. Bairdner*, 1696, Mor. 3367; doubted by Bell, Com. ii. 418.

See Bell, Com., M'L. ed., ii. 417; Goudy, Bankruptcy, 3rd ed., p. 556; Gloag and Irvine, Rights in Security, p. 58.

⁶ *M'Cutcheon v. MacWilliam*, 1876, 3 R. 565.

⁷ *Stair, ii. 3, 48; Wylie v. Duncan*, 1803, 3 Ross's L.C. 136, per Lord Pres. Campbell.

of the bond, payment to the original creditor will be good if made before intimation of the assignation was received, and before the original creditor was divested by the completion of the right of the assignee.¹ Again, if the creditor enters into possession and uplifts the rents of the subjects, he is bound to account for his intromissions, and if he retains from the rents a sum more than sufficient to pay interest, his debt and security will be *pro tanto* diminished, and a defence founded on the creditor's intromissions is good in a question with an assignee from him.²

1452. A heritable security may be extinguished by compensation, if the bondholder is otherwise indebted to the debtor in an equal or greater amount. Compensation may take place, even although one debt is unsecured and the other secured,³ but it does not take effect unless pleaded.⁴ When pleaded, the effect is that the two debts are held to be extinguished from the date at which the *concursum crediti et debiti* took place, and the assignee of a heritable security is therefore exposed to the risk of finding his debt and security extinguished by compensation with a debt due by his cedent to the debtor in the security, provided that the *concursum* took place before the assignation.⁵

1453. Again, a heritable security may be extinguished by confusion, when the capacities of debtor and creditor are united in the same person. This may occur by the granter acquiring the bond, or by the grantee acquiring the subjects over which the bond is granted. In either case the bond is extinguished *confusione*, and cannot be kept up as a separate and independent right.⁶ Confusion, however, does not take place when a person obtains right to the bond in a different capacity from that in which he holds the subjects,⁷ or when his right to the bond is absolute, and his right to the subjects limited or postponed. Thus, a fiar may take an assignation to a bond affecting the estate, and keep it up as a subsisting obligation against the liferenter.⁸ And an heir of entail may acquire securities affecting the estate, and maintain them as burdens, or assign them to a third party.⁹ On paying off such a burden he should be careful to take an assignation to it, as it is doubtful whether, if a mere discharge were taken, the security would not be held to be extinguished *confusione*.¹⁰ It has been laid down that the principle of extinction of obligations *confusione* is not to be extended out of mere deference to legal logic,¹¹ and so it was held that a ground annual was

¹ *Macdowal v. Fullerton*, 1714, Mor. 576; *Woodmas v. Hislop's Trs.*, 1825, 3 S. 476.

² *Baillie v. Menzies*, 1711, 3 Ross's L.C. 713.

³ *Hay v. Crawford*, 1712, Mor. 2571.

⁴ Bell's Prin., s. 575.

⁵ *Rankin v. Arnot*, 1680, 2 Ross's L.C. 707; *Shiells v. Ferguson, Davidson & Co.*, 1876, 4 R. 250.

⁶ *Love v. Storie*, 1863, 2 M. 22; *Murray v. Parlange's Trs.*, 1890, 18 R. 287; cp. *Macenzie v. Gordon*, 1838, 16 S. 311; affd. M'L. & R. 117.

⁷ *Fleming v. Imrie*, 1868, 6 M. 363; *King v. Johnston*, 1908 S.C. 684.

⁸ *Fraser v. Carruthers*, 1875, 2 R. 595.

⁹ *Welsh v. Barstow*, 1837, 15 S. 537; *Macalister v. Macalister*, 1865, 4 M. 245; *Colville's Trs. v. Marindin*, 1908 S.C. 911.

¹⁰ *Duke of Roxburgh v. Wauchope*, 1825, 1 W. & S. 41;

¹¹ *Healy & Young's Tr. v. Mair's Trs.*, 1914 S.C. 893, per Lord Johnston.

not extinguished when the creditor became the proprietor of the ground burdened,¹ and that a prior bond did not lose its priority because, in the course of transfer to a new lender, debtor and creditor were for a short period the same.¹ See CONFUSIO.²

¹ *Whitely v. Delaney*, [1914] A.C. 132.

² Vol. IV. p. 386, *ante*.

HERITORS.

See CHURCH.

HERSHIP.

See CRIME.

HIGH COURT OF JUSTICIARY.

See JUSTICIARY, HIGH COURT OF.

HIGHWAYS.

See ROADS AND BRIDGES.

HIRE-PURCHASE.

See HIRING; HYPOTHEC; SALE.

HIRING.

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INTRODUCTION.

1454. Hiring is that contract by which one party agrees, for a consideration which the other engages to pay, to give to that other for a period of time the use of a thing or services. A contract of hiring falls under one of three heads:—(a) Hiring of heritable subjects; (b) hiring of moveables; (c) hiring of services.

The hiring of heritable subjects is considered elsewhere. See LEASE. Here there will be treated, with certain exceptions, (1) hiring of move-

ables, (2) hiring of services. As to hiring of seamen, see SEAMEN; and as to hiring of ships, see CARRIAGE BY SEA.¹

PART I.—HIRING OF MOVEABLES.

SECTION 1.—ESSENTIALS OF THE CONTRACT.

1455. The essentials of the contract of hiring of moveables (*locatio conductio rei*) are a subject, the use of which is given, a period for which the use of the thing is given, and a consideration for the use of the thing.

The subject must be one capable of being used without being consumed. Accordingly fungibles are not the proper subject of this contract. But the subject need not be a specific thing—a liveryman, for example, may agree to furnish a horse for a carriage although the parties have not fixed on any particular horse of which the use is to be given.²

The period may be of any length, and it is not necessary that a definite period be agreed on at the time of the contract. Where no period is agreed upon, the custom with regard to the hiring of things of the kind in question governs.

The consideration prestable for the use of the thing ought, by the civil law, to be in money. Stair³ held that by Scots law it might be in any fungible, as oil, wheat, etc. According to the modern view, both in Scotland and England, it appears that the consideration may take any form.⁴ The hire may be fixed at the time, or may be left to be fixed by a third person. In the absence of agreement it will be fixed according to the custom of the trade, or the Court will fix a fair price for the use received.

SECTION 2.—FORMATION OF THE CONTRACT.

1456. The contract is consensual, no form is necessary, and it may be proved *prout de jure*. The general rules of contract law governing offer and acceptance, capacity of parties, reality of consent, and legality of object, obtain. An example of a contract of hiring held to be null and void on the ground of illegality of object may be found in the case undernoted.⁵

SECTION 3.—OBLIGATIONS ON THE LETTER.

SUBSECTION (1).—*Delivery to Hirer.*

1457. The letter must deliver the subject to the hirer.⁶ If the thing is not in his possession at the time when the contract is entered into

¹ Vol. III. p. 26, *ante*. See Carver, Carriage by Sea, 7th ed., ss. 112 *et seq.*, as to what charters amount to a hire of the ship.

² Bell, Com. i. 481.

³ i. 15, 1.

⁴ *Wilson v. Orr*, 1879, 7 R. 266; *Sanderson v. Collins*, [1904] 1 K.B. 628.

⁵ *Pearce v. Brooks*, 1866, L.R. 1 Ex. 213.

⁶ Story on Bailments, 4th ed., s. 383.

he is bound to procure it and put the hirer in possession; failure to do so is a breach for which he is liable in damages, and insolvency is no excuse for failure to deliver.¹ If, however, the subject has been destroyed by accident, and without any fault on his part, the contract is at an end, and neither party has any claim against the other;² but where the subject of the contract is indefinite, the destruction of any one article will not free the letter from his obligation.³ If the hirer wrongfully refuses to take delivery of the thing, the letter may sue for damages but not for hire accrued to the date of the action.⁴

SUBSECTION (2).—*Maintenance of Use and Enjoyment.*

1458. The letter must maintain the hirer in the use and enjoyment of the thing. If he obstructs the hirer in the use of the thing, or suffers the hirer to be evicted owing to defects in his title, he is in breach and liable in damages. But he is not in breach where the hirer's use is interfered with by *damnum fatale*⁵ or the wrongful or negligent acts of third parties; in such a case, however, he will have either to replace the thing or allow an abatement of the hire.

SUBSECTION (3).—*Upkeep and Repair.*

1459. The letter must keep the thing in suitable order and repair for the use contemplated.⁶ The general rule may, however, be modified by local usage or the custom of trade; thus the hirer of a horse is usually bound for all the ordinary expenses of its upkeep while in his possession, as food, shoeing, etc.⁷ If the hirer incurs expenses for repair or upkeep he will be entitled to recover, provided he can shew that the occasion of the expense was not to be ascribed to him, that the expense was indispensably necessary, and that the letter had notice of it as soon as circumstances permitted.¹

SUBSECTION (4).—*Warranty of Fitness.*

1460. The letter must deliver the thing in a condition reasonably fit for the purpose for which it is hired.⁸ In other words, the letter is deemed to have warranted the thing to be as fit for its contemplated use as skill and care can make it.⁹ Hence, if the thing is incapable of the use for which it was let, the letter is liable in damages; and if the thing breaks down the letter is liable in the damage sustained by the hirer, unless he can shew that the break-down was in the proper sense

¹ Bell, Com. i. 482.

² *Taylor v. Caldwell*, 1863, 3 B. & S. 826; 32 L.J. Q.B. 164.

³ *Ibid.*, at p. 166.

⁴ *National Cash Co. v. Stanley*, [1921] 3 K.B. 292.

⁵ *Nichols v. Marsland*, 1876, L.R. 2 Ex. D. 4; Story, ss. 385, 386.

⁶ Story, ss. 383, 388; *Reading v. Menham*, 1832, 1 M. & R. 234.

⁷ Story, s. 393; *Handford v. Palmer*, 1820, 5 Moo. 74.

⁸ Ersk. iii. 3, 15; *Wilson v. Norris*, 10th March 1810, F.C.

⁹ *Hyman v. Nye*, 1881, 6 Q.B.D. 685; *The "West Cock,"* [1911] P. 208.

of the word an accident not preventible by care or skill.¹ The damage which the letter is responsible for is any damage which could reasonably be contemplated as likely to ensue from a defect. Thus, where A. let to B. sacks for unloading a cargo of peas, and one of the sacks gave way and fell on an employee of B. who established a claim against B. for compensation, it was held that the damage thus sustained by B. was not too remote, and that he could recover from A. the amount of the compensation and expenses.²

1461. Where the subject let is a specific thing there is some doubt whether the implied warranty of fitness exists or only an obligation not to allow the subject to deteriorate in the interval between the formation of the contract and the time for the thing to be delivered to the hirer.³ Probably the correct view is, that there is an implied warranty of fitness whether the subject let is a specific thing or an indefinite thing, but that the burden of proving that the hirer waived the implied warranty of fitness and took the risk of defects is not so great where the subject is a specific thing as where it is an indefinite thing.⁴

SECTION 4.—OBLIGATIONS ON THE HIRER.

SUBSECTION (1).—*Uses of Subject Hired.*

1462. The hirer may not put the thing to a use other than that for which it is hired.⁵ If he puts it to any other use, he will be liable for any resulting damage to the thing. Thus if the hirer causes a horse, which he has hired for riding, to jump a fence, and it is injured, he will be liable in damages.⁶ Again, it has been decided in Scotland that to take a horse, which has been hired for a ride along a road, into a grass field and gallop it there, is to go beyond the implied conditions of the contract on which the horse was hired; and the hirer was held liable in damages for the loss of the horse.⁷ Moreover, it would seem that the hirer could be interdicted from improper use of the thing.

SUBSECTION (2).—*To take Reasonable Care.*

1463. The hirer must take reasonable care of the thing. At one time there was much discussion as to the degree of diligence which the hirer must display in caring for the subject, but recent authorities, both in England and Scotland, are agreed that he must exercise such care as a prudent man would shew to his own property.⁸ Accordingly, he is

¹ *Readhead v. Midland Rly. Co.*, 1867, L.R. 2 Q.B. 412; *Francis v. Cockrell*, 1870, L.R. 5 Q.B. 501.

² *Vogan & Co. v. Oulton*, 1899, 81 L.T. 435; see also *Jones v. Page*, 1867, 15 L.T. 619; *Beniley & Co. v. Metcalfe*, [1906] 2 K.B. 548.

³ *Robertson v. Amazon Tug Co.*, 1881, 7 Q.B.D. 598; *Fowler v. Lock*, 1872, L.R. 7 C.P. 272; 1874, L.R. 9 C.P. 751.

⁴ See *Fowler v. Lock*, *supra*; *Jones v. Page*, *supra*.

⁵ Bell's Prin., s. 144.

⁶ *Burnard v. Haggis*, 1863, 14 C.B. (N.S.) 45.

⁷ *Seton v. Paterson*, 1880, 8 R. 236.

⁸ Bell, Com., i. 483; notes to *Coggs v. Bernard*, 1 Sm. L.C., 12th ed., p. 197.

liable only for the negligence of himself or persons for whom he is responsible, not for fair wear and tear, injury caused by act of God,¹ the negligence of another for whom he is not responsible,² or the delict of another, even though a servant.³ The question of negligence is one to be determined upon the facts of each case, and no general rule can be laid down.⁴ For example, where the hirer of a horse which fell ill on his hands prescribed for it himself instead of calling in a veterinary surgeon, and the horse died, he was held liable.⁵ So also the hirer of a horse has been held liable for over-riding a horse and not taking proper care of it when heated.⁶

1464. The hirer is not merely responsible for his own negligence, but he is also liable for the negligence of his servants acting within the scope of their employment. Thus, if A. lets B. a carriage, and B.'s servant, while driving his master, through negligence allows the carriage to be injured, B. is liable to make good the damage; but if the servant takes out the carriage without the authority of his master, and by his negligence causes injury to be done, B. is not liable to A.⁷ Apparently the hirer would also be responsible for injury to the thing due to negligence of any third party to whom he expressly or impliedly confided the control of the thing,⁸ but not for injury done by an independent third party (e.g. an innkeeper) to whose care the thing has been properly entrusted.⁹ On the other hand, the hirer is of course not responsible for injury caused by the negligence of a servant of the letter, who in terms of the contract has charge of the thing, but if the hirer takes the charge out of the hands of the letter's servant he is liable for injury arising from negligent management.¹⁰

1465. The presumption is that damage to or loss of the thing is caused by circumstances for which the hirer is responsible.¹¹ But the burden of proof on the hirer must not be put too high; if he proves that he exercised reasonable care he discharges it, and is not under the necessity of proving the immediate cause of the loss or injury.¹²

SUBSECTION (3).—*To Restore the Thing Hired.*

1466. The hirer must restore the thing at the termination of the contract in as good condition as he received it, fair wear and tear

¹ *Taylor v. Caldwell*, 1863, 3 B. & S. 826, at p. 838.

² *Tilling v. Balmain*, 1892, 8 T.L.R. 517.

³ *Trotter v. Buchanan*, 1688, Mor. 10080; *Walker v. The British Guarantee Association*, 1852, 18 A. & E. 277; and cf. *Cheshire v. Bailey*, [1905] 1 K.B. 237.

⁴ *Searle v. Laverick*, 1874, L.R. 9 Q.B. 122.

⁵ *Dean v. Keate*, 1811, 3 Camp. 4, and notes.

⁶ *Campbell v. Kennedy*, 1828, 6 S. 806.

⁷ *Sanderson v. Collins*, [1904] 1 K.B. 628; but see *Coupé Co. v. Maddick*, [1891] 2 Q.B. 413.

⁸ *Stead v. Bligh*, 1898, 62 J.P. 458.

⁹ *Smith v. Melvin*, 1845, 8 D. 264.

¹⁰ *Stead v. Bligh*, *supra*; on the question of what constitutes the relationship of master and servant *pro hac vice*, see *Ainslie v. Leith Docks Commrs.*, 1919 S.C. 676.

¹¹ *Wilson v. Orr*, 1879, 7 R. 266; *Dollar*, the Times, 18th May 1905.

¹² *Bullen v. The Swan Electric Co.*, 1907, 23 T.L.R. 258; but see *Marquis v. Ritchie*, 1823, 2 S. 386; *Pyper v. Thomson*, 1843, 5 D. 498; *Pullars v. Walker*, 1858, 20 D. 1238; *Mustard v. Paterson*, 1923 S.C. 142.

excepted.¹ Performance of this duty is, however, not exigible in certain circumstances. The hirer may resist delivery where he acts under the authority of a third person having a preferable right to the thing, but the mere setting up of a *jus tertii* will not suffice.² The hirer is excused if he is not able to deliver through no fault of his own.³ The time, place, and manner in which the article is to be restored must be determined by the circumstances, if not fixed by the parties on entering into the contract.

SUBSECTION (4).—*Payment of Hire.*

1467. The hirer must pay the price of hire. If, however, the subject is injured during the period of the contract by inevitable accident or by the negligent or wrongful acts of persons for whom he is not responsible, the hirer will be entitled to a corresponding deduction from the hire. If the subject is destroyed, the contract is terminated and liability for hire ceases. This holds good even where the destruction of the thing is due to the fault of the hirer, but, of course, leaves unaffected any claims open to the letter for damages or loss of profit.⁴ On default in payment of the hire the letter can retake the thing,⁵ and resumption of possession does not prevent him from also suing for arrears.⁶

SECTION 5.—LIABILITY OF LETTER TO THIRD PARTIES.

1468. The letter is not liable to third parties for damages sustained by them owing to the negligent use of the thing hired by the hirer or his servant,⁷ and this rule applies in the case of a vehicle which bears the name of the letter;⁸ but where a servant of the letter accompanies the thing hired the letter is liable for the servant's negligence in the scope of his employment,⁹ unless it appears that the servant is *pro hac vice* the servant of the hirer.¹⁰ A criminal act by a servant of the letter, being outside the scope of his employment, would not make his master liable¹¹ unless he knew that the servant was untrustworthy or had not exercised proper care in selecting him.¹² Although at common law the driver of a hackney cab is not the servant of the proprietor, yet it has been held in England that the relationship is created by the Hackney

¹ Cf. *Schroder v. Ward*, 1863, 32 L.J. C.P. 150.

² *Rogers v. Lambert*, 1890, 24 Q.B.D. 573; *Barker v. Furlong*, [1891] 2 Ch. 172.

³ *Taylor v. Caldwell*, 1863, 32 L.J. Q.B. 164, at p. 166; *Walker v. The British Guarantee Association*, 1852, 18 A. & E. 277.

⁴ *London and Edinburgh Shipping Co. v. The Admiralty*, 1920 S.C. 309.

⁵ *Leman v. Yorkshire Railway Waggon Co.*, 1881, 50 L.J. Ch. 293; *Cramer v. Giles*, 1883, 1 Cab. & E. 151.

⁶ *Brooks v. Beirnsstein*, [1909] 1 K.B. 98.

⁷ *Smith v. Bailey*, [1891] 2 Q.B. 403; *Wilson v. Caledonian Rly. Co.*, 1887, 24 S.L.R. 541.

⁸ *Smith v. Bailey*, *supra*.

⁹ *Anderson v. Glasgow Tramway Co.*, 1893, 21 R. 318; *Cairns v. Clyde Navigation Trustees*, 1898, 25 R. 1021; *Jones v. Mayor of Liverpool*, 1885, 14 Q.B.D. 890; *Waldock v. Winfield*, [1901] 2 K.B. 596; *Smith v. General Motor Co.*, [1911] A.C. 188.

¹⁰ *Anderson v. Glasgow Tramway Co.*, *supra*, per Lord Pres. Robertson at p. 320; *Rourke v. White Moss Co.*, 1876, 2 C.P.D. 205; *Ainslie v. Leith Dock Commrs.*, 1919 S.C. 676.

¹¹ Cf. *Cheshire v. Bailey*, [1905] 1 K.B. 237.

¹² *Jobson v. Palmer*, [1893] 1 Ch. 71.

Carriage Acts so as to make the registered proprietor liable for the driver's negligence.¹ It is not clear whether, and if so within what limits, the letter is liable in damages to third parties who have suffered from a non-latent defect in the thing hired.²

SECTION 6.—LIABILITY OF HIRER TO THIRD PARTIES.

1469. The hirer is liable to third parties for damages sustained by them in consequence of the negligent use of the thing hired by the hirer or his servant acting within the scope of his employment, but he is not liable for the negligence of the letter's servant unless the circumstances shew that control and direction of the servant had passed to the hirer.³ In cases where without negligence in the use of the thing damage is caused to third parties by a non-latent defect in the thing, the hirer is liable, but he may have a right of relief against the letter on the ground that the thing was not fit for the purpose of the hire.⁴

SECTION 7.—RIGHTS OF LETTER AGAINST THIRD PARTIES.

1470. The doctrine of reputed ownership, whereby creditors of a person possessing a thing ostensibly as owner could attach it for debt, has now very limited scope.⁵ The general rule is that it does not apply to goods on hire.⁶ The letter's right cannot be defeated by a lien founded on mere possession by the hirer.⁷ In some circumstances, however, the actings of the letter may bar him from founding on the limited title he gave to the hirer.⁸ The letter's right may, however, be defeated if the thing become a fixture on property disposed in security,⁹ and by a landlord's hypothec.¹⁰

1471. The letter may recover the thing hired from any third party who has acquired possession of it from the hirer, whether as purchaser,

¹ *Keen v. Henry*, [1894] 1 Q.B. 292; *Gates v. Bill*, [1902] 2 K.B. 38; *Bygraves v. Dicker*, [1923] 2 K.B. 585; cf. the Burgh Police (Scotland) Act, 1892, ss. 270 *et seq.*

² See *Wilson v. Wordie & Co.*, 1905, 7 F. 927; cf. *Oliver v. Saddler & Co.*, 1928 S.C. 608; *Heaven v. Pender*, 1883, 11 Q.B.D. 503; *Earl v. Lubbock*, [1905] 1 K.B. 253; *Cavalier v. Pope*, [1906] A.C. at p. 432; *Fairman v. Perpetual Investment Society*, [1923] A.C. 74; *Shillinglaw v. Turner*, 1925 S.C. 807; *Langridge v. Levy*, 1837, 2 M. & W. 519; *Barry v. Croskey*, 1861, 2 J. & H. 1, at p. 23; and see NEGLIGENCE.

³ *Anderson v. Glasgow Tramway Co.*, 1893, 21 R. 218; *Jones v. Scullard*, [1898] 2 Q.B. 565.

⁴ *Jones v. Page*, 1867, 15 L.T. 619; *Francis v. Cockrell*, 1870, L.R. 5 Q.B. 501; *Vogan & Co. v. Oulton*, 1899, 81 L.T. 435.

⁵ *Robertsons v. M'Intyre*, 1882, 9 R. 772, at p. 778; *Liddell's Trs. v. Warr*, 1893, 20 R. 989, at p. 994.

⁶ Goudy on Bankruptcy, 4th ed., p. 296, and cases there cited; Graham Stewart on Diligence, p. 341.

⁷ *Lamonby v. Foulds, Ltd.*, 1928 S.C. 89; *Mitchell v. Heys & Co.*, 1893, 21 R. 609. On the other hand, the Court of Appeal in England reached a contrary conclusion in *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307.

⁸ *Lamonby v. Foulds, Ltd.*, *supra*, at p. 95.

⁹ See FIXTURES, p. 149, *ante*; Graham Stewart on Diligence, p. 70.

¹⁰ See HYPOTHEC; Graham Stewart on Diligence, p. 467; but see *Edinburgh Albert Buildings Co. v. General Guarantee Corporation*, 1917 S.C. 239.

pledgee, or otherwise.¹ He may also, pending the contract, recover damages from third parties by whose negligence the thing hired is permanently injured.²

SECTION 8.—RIGHTS OF HIRER AGAINST THIRD PARTIES.

1472. “By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it, or any injury to it, during the existence of his right”;³ and it makes no difference that he has a good answer to an action by the letter for damages for the loss or injury.⁴ But if he recovers damages he can only retain enough to compensate for his own loss, and must hand over the balance to the letter.⁵

SECTION 9.—HIRE-PURCHASE.

1473. “Hire-purchase is a contract whereby A. agrees (1) to give the use of a thing to B. for a certain time, or such less time as B. may elect to receive its use, in consideration of B. making specified payments at fixed intervals so long as he retains the thing; and (2) in the event of B. electing to retain the thing for the full time, and rendering the last periodical payment, to give to B. the property of the thing.” The contract is in reality one of hire, with an option to the hirer to become a purchaser; and until the hirer does become a purchaser, by electing to retain for the full time and making the last periodical payment, the contract is a hiring agreement subject to the rules and principles applicable thereto.⁶

1474. The contract must be distinguished from a contract of sale where the price is payable in instalments. The substantial difference is that a letter has, but a seller has not, the right to recover the thing from third parties to or with whom the receiver of the thing has sold or pledged it before the last instalment is paid. At common law, however, a seller could secure the right of a letter pending payment of the last instalment, by stipulating that the property in the thing should not pass until the last instalment was paid;⁷ but in virtue of the Sale of Goods Act, 1893, s. 25, repeating a provision of the Factors Act, 1889 (made applicable to Scotland by the Factors (Scotland) Act, 1890), a sale subject to such a suspensive condition is on the same footing as an ordinary sale *quoad* the rights of third parties who have in good faith bought the thing or taken it in pledge.⁸ As against the purchaser’s

¹ *Cooper v. Willomat*, 1845, 1 C.B. 672; *Singer Co. v. Clark*, 1879, 5 Ex. D. 37; *Burrows v. Barnes*, 1900, 82 L.T. 721; *Keene v. Thomas*, [1905] 1 K.B. 136.

² *Mears v. London and South-Western Rly. Co.*, 1862, 11 C.B. (N.S.) 850.

³ *Story*, s. 394.

⁴ *The “Winkfield,”* [1902] P. 42.

⁵ *Ibid.*, at p. 61.

⁶ *Helby v. Matthews*, [1895] A.C. 471; *Brooks v. Beirnsstein*, [1909] 1 K.B. 98; *Cramer v. Giles*, 1883, 1 Cab. & E. 151; *Marston v. Kerr’s Trs.*, 1879, 6 R. 898; *Belsize Motor Co. v. Cox*, [1914] 1 K.B. 244; *Lewis v. Thomas*, [1919] 1 K.B. 319.

⁷ *Murdoch & Co. v. Greig*, 1889, 16 R. 396.

⁸ *Lee v. Butler*, [1893] 2 Q.B. 319.

general creditors, however, the seller's proprietary right is effectual.¹ In determining whether a given contract is one of sale or of hire, the mere fact that the language used is appropriate rather to a hiring agreement has little weight; unless the receiver of the thing is free to return it before the last periodical payment falls due, the contract is one of sale.²

PART II.—HIRING OF SERVICES.

SECTION 1.—SPECIES OF THE CONTRACT.

1475. There are two species of this contract—(a) A. may agree for a consideration to place his whole services in a particular capacity (*e.g.* as gardener or clerk, etc.) at the disposal or under the direction and control of B. during a period of time (*locatio-conductio operarum*). (b) A. may agree for a consideration to do a particular job or perform a specific service (*e.g.* take care of goods, carry goods, etc.) for B. (*locatio-conductio operis faciendi*). In (a) the relation of master and servant is created, while in (b) it is not.³ The former species of the contract will be treated here, also that variety of the latter species known as Hiring of Custody. Other varieties of the contract *locatio-conductio operis* are treated under separate headings (*e.g.* Carriage).⁴ There is, indeed, a third species of hiring of services, where A. lets to B. not his own services but those of another; a common example of this is where a carriage-hirer sends his servant to drive the carriage. In such a case there is no contractual tie between the hirer and the servant, and the contract resembles rather *locatio rei*, and has already been incidentally noticed under that head.⁵

SECTION 2.—LOCATIO-CONDUCTIO OPERARUM.

SUBSECTION (1).—*Test of Relation of Master and Servant.*

1476. It is sometimes difficult to determine whether a contract between two persons, involving service, establishes the relation of master and servant, or whether it falls under some other category of contract, such as agency, partnership, or one of the various forms of *locatio operis*. It is a question depending on the circumstances of each case whether or not the relation of master and servant is established, but the following general rule was approved by Lord Kinnear in a recent case:—"The relation of master and servant exists only between persons of whom one has the order and control of the work done by the other" . . . 'a servant is a person subject to the command of his master as to the manner in which he shall do his work.' In a contract by which one

¹ *M'Entire v. Crossley Bros., Ltd.*, [1895] A.C. 457.

² *Marston v. Kerr's Trs.*, 1879, 6 R. 898; *Cropper & Co. v. Donaldson*, 1880, 7 R. 1108; Lord Pres. Inglis in *Murdoch & Co. v. Greig*, 1889, 16 R. 396, at p. 400; *Lee v. Butler*, [1893] 2 Q.B. 319.

³ *Brenan v. Campbell's Trs.*, 1898, 25 R. 423.

⁴ See CARRIAGE BY LAND, Vol. III. p. 1, *ante*. CARRIAGE BY SEA, Vol. III. p. 26, *ante*.

⁵ See paras. 1468, 1469, *supra*.

undertakes to produce a given result, but so that in the actual execution of the work he is not under the direction of the person for whom it is done but may use his own discretion in things which are not specifically fixed by the contract itself, the relation of master and servant does not exist.”¹

SUBSECTION (2).—*Essentials of the Contract.*

1477. The essentials of the contract are the services, the use of which is to be given, the period during which the services are to be given, and the remuneration that is to be paid for the services.

(i) *The Services.*

1478. The particular capacity in which the letter is to act is usually a sufficiently clear criterion of the services he is bound to render. Where, however, a professional man lets his services, questions sometimes arise whether certain work which he has performed is covered by the contract or whether he is entitled to additional remuneration for it. Where a claim is made for services outside the scope of the contract, Lord Deas laid down that there must be specification of three things—(1) of the duties of the office for which the servant was originally engaged, (2) of the extra duties performed by him, (3) of the agreement to give remuneration for the extra services.²

(ii) *The Period.*

1479. Whenever the period of service is fixed by the contract the parties will be bound by its terms. The contract may be for any period, long or short, or only during pleasure, or that each party may terminate the contract by giving certain notice or paying a fixed penalty. But it sometimes happens that no period has been fixed by the parties, when the law will presume the period from the relations of the parties, the circumstances of the case, and the custom of the district as applied to that kind of service. In England, a contract of “general hiring,” as it is called, when no period is fixed, lasts for a year; in hiring menial or domestic servants, the period, if it is not fixed by the parties, is determined by law to be a year, with the right to each party to end the contract on a month’s notice. In Scotland, no general rule of law has been fixed, and it depends on the circumstances and customs in each case what term will be presumed by law, if no period has been fixed by the parties. An agreement to give regular employment does not bind the employer to keep the servant so long as he is willing and able to work.³ An arrangement that the servant shall be paid so much per

¹ *Scottish Insurance Commrs. v. Church of Scotland*, 1914 S.C. 16, at p. 23; see also *Scottish Insurance Commrs. v. M’Naughton*, 1914 S.C. 826; *Scottish Insurance Commrs. v. Edinburgh Infirmary*, 1913 S.C. 751; *Ainslie v. Leith Docks Commrs.*, 1919 S.C. 676.

² *Latham v. Edinburgh and Glasgow Rly. Co.*, 1866, 4 M. 1084; see *Mackison v. Mags. of Dundee*, 1910 S.C. (H.L.) 27; *Mackenzie v. Baird’s Trs.*, 1907 S.C. 838; *Mellor v. Beardmore*, 1927 S.C. 597.

³ *Lawrie v. Brown & Co.*, 1908 S.C. 705.

week, month, or year, does not decide that the period of engagement is a week, month, or year accordingly.¹

1480. Menial or domestic servants, especially in towns, are usually presumed to be hired for six months.² Farm-servants are presumed to be hired for a year. Gardeners are usually presumed to be hired for a year, although there is no direct decision to that effect.³ Coachmen are in the same position as other domestic servants, and are not presumed to be hired for a year.⁴ Gamekeepers who are provided with a house are presumed to be engaged for a year.⁵ Farm grieves are presumed to be hired for a year.⁶ Tutors and governesses are usually presumed to be hired during pleasure, and the contract may be terminated on reasonable notice; but special circumstances may be proved to shew that the contract was for a longer term.⁷ Teachers appointed by an Education Authority hold their office at the pleasure of the Authority, but in dismissing a teacher the statutory procedure must be followed (see EDUCATION).⁸ Private schoolmasters, in the absence of any stipulation to the contrary, hold their offices at the pleasure of the managers.⁹ Clerks, commercial agents, and managers of banks, etc., are presumed to hold their situations at the pleasure of their employers, and may be dismissed on reasonable notice being given.

(iii) *Tacit Relocation.*

1481. Where due interruption or warning that the engagement is to terminate is not made or given by either party, the engagement is held to be renewed in all its parts from term to term by tacit relocation.¹⁰ The renewal cannot be for more than a year, or such shorter period as is customary in the particular kind of service, even where the original agreement was for a longer period, because no verbal contract can be valid for more than a year.¹¹ In special cases the terms of the contract of service and the circumstances under which it was entered into may exclude the operation of tacit relocation.¹²

(iv) *Warning.*

1482. There is no formal style of warning of termination of a contract of service. It is enough that notice be given at the proper period.

¹ *Baird v. Don*, 1779, Mor. 9182; 5 Bro. Supp. 514; *Groom v. Clark*, 1859, 21 D. 831; *Forsyth v. Heatherknowe Coal Co.*, 1880, 7 R. 887; *Todd v. Arrol*, 1881, 18 S.L.R. 673; but see *Dowling v. Henderson*, 1890, 17 R. 921.

² Bell's Prin., s. 174.

³ *Groom v. Clark*, *supra*.

⁴ *Scott v. M'Murdo*, 1869, 6 S.L.R. 301.

⁵ *Armstrong v. Bainbridge*, 1846, 9 D. 29 and 1198; *Cameron v. Fletcher*, 1872, 10 M. 301.

⁶ *Muir v. Mackenzie*, 1829, 7 S. 717.

⁷ Bell's Prin., s. 174; *Moffat v. Shedden*, 1839, 1 D. 468.

⁸ See Vol. VI. p. 87, *ante*.

⁹ Bell's Prin., s. 2189.

¹⁰ Bell's Prin., s. 173; *Baird v. Don*, *supra*; *Tait v. Macintosh*, 1841, 16 F.C. 658; *Morrison v. Allardyce*, 1823, 2 S. 434.

¹¹ Fraser, Master and Servant, 3rd ed., p. 58.

¹² *Lennox v. Allan*, 1880, 8 R. 38; and see *Stanley, Ltd. v. Hanway*, 1911, 2 S.L.T. 2.

The parties may, by their actings and communings, intimate their intention to terminate the contract without formal notice, as when a gentleman tells his coachman that he intends to give up his carriage at Whitsunday.¹ Agricultural and domestic servants engaged for a year or half a year are entitled by custom to forty days' warning, and a warning of less time would be held no warning at all. The forty days' warning only operates to prevent tacit relocation, and does not free parties from the original agreement.² If the servant is hired by the month he is entitled to a month's warning only.³ As to other classes of servants, reasonable notice must be given.⁴ A sewing mistress has been held entitled to three months' notice;⁵ a manager of a colliery to three months,⁶ a clerk of works to four weeks,⁷ and a "shipping agent" to one year.⁸ As to manufacturers, mechanics, and artisans, the length of notice depends on the agreement between the parties, the custom of the trade and the relations of the parties. In the absence of any proof as to custom, the Court will require reasonable notice.⁹ Sometimes the service is ended without any notice, as when the servant is hired for a special purpose and the purpose is fulfilled, or when the occasion for the services is ended.¹⁰ If either party pleads a special custom, he must prove it to be "uniform and notorious" in order to have effect given to it.¹¹

(v) *Remuneration.*

1483. The remuneration is usually fixed at the time the contract is entered into; but if nothing is said about wages, they are still due, and the Court will fix what in the circumstances is a fair remuneration.¹²

SUBSECTION (3).—*Formation of the Contract.*

(i) *Form and Proof of Contract.*

1484. The general rules of the law of contract governing offer and acceptance, form, capacity of parties, reality of consent, legality of object, obtain. See CONTRACT.¹³ Although the general rule is that an agreement must be made by words, there are certain cases where an agreement for the hire of services has been inferred from conduct. "The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance."¹⁴ In

¹ Fraser, Master and Servant, p. 59; *Macdonell v. Dixon*, 1805, M. App. "Mutual Contract," No. 3; *Maclean v. Fyfe*, 4th February 1813, F.C.

² *Wallace v. Wishart*, 1800, Hume 283.

³ Fraser, Master and Servant, 3rd ed., p. 60.

⁴ *Morrison v. Abernethy School Board*, 1876, 3 R. 945.

⁵ *Robson v. Overend*, 1878, 6 R. 213.

⁶ *Forsyth v. Heatheryknowe Coal Co.*, 1880, 7 R. 887.

⁷ *Currie v. Glasgow Stores*, 1905, 13 S.L.T. 88.

⁸ *Stevenson v. North British Rly. Co.*, 1905, 7 F. 1106.

⁹ *Mollison v. Baillie*, 1885, 22 S.L.R. 595.

¹⁰ *London, etc. Shipping Co. v. Ferguson*, 1850, 13 D. 51.

¹¹ *Morrison v. Allardyce*, 1823, 2 S. 434.

¹² See paras. 1506 and 1512, *infra*.

¹³ See Vol. IV. p. 441, *ante*.

¹⁴ Anson's Law of Contract, 16th ed., p. 22.

general, where one does work for another there is a presumption that the work is to be paid for.¹ But where the defender stands *in loco parentis* to the pursuer, who resides with him, there is in Scotland no presumption of a contract of employment,² even though the services rendered are business and not domestic services.³

1485. By the civil law, the contract of *locatio-conductio* was a consensual contract and therefore complete without writing. Our law has so far followed it, that contracts of service for a year or less need not be authenticated by writing. But, on the analogy of tacks of heritable subjects, contracts of service for more than a year must be proved by writing.⁴ It lies with the party founding on the contract to prove its terms, even when there is an allegation by the other party that the contract was conditional, and that the condition had not been purified.⁵ If there has been a verbal contract for more than one year, and there has been no *rei interventus*, it is very doubtful if the contract is valid even for one year.⁶ But if the servant has entered upon the service, then the contract is valid for one year, but not more.⁷ If it is stipulated that the contract should be reduced to writing, there is *locus pœnitentiæ* till that is done and the writing is formally executed. In order that a written contract may be valid of itself, it must be either probative or constituted by missives holograph of the parties. The rule as to writings *in re mercatoria* does not apply to contracts of service.⁸ By the Stamp Act, 1891,⁹ "An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant," is exempt from stamp duty; but this does not apply to contracts of apprenticeship, nor to an agreement for the hire of a clerk.

1486. When an agreement to serve is contained in an improbate writing, or is otherwise incomplete, it may be validated by *rei interventus*.¹⁰ The doctrine "is grounded on the fact of the person, otherwise imperfectly bound, having permitted another to proceed on his obligation or agreement as if it were complete, and to perform on the faith of it acts unequivocally referable to, or resulting from, the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed."¹¹ The terms of the contract must be discovered from the informal writing,¹² and

¹ *Thomson v. Thomson's Trs.*, 1889, 16 R. 333.

² *Russell v. M'Chymont*, 1906, 8 F. 821.

³ *Urquhart v. Urquhart's Trs.*, 1905, 8 F. 42; see also *Stuart v. M'Leod*, 1901, 9 S.L.T. 192; *Anderson v. Halley*, 1847, 9 D. 1222; *Marshall*, Scotsman, 9th June 1911; *Ritchie v. Ferguson*, 1849, 12 D. 119; *Miller v. Miller*, 1898, 25 R. 995; *Gloag on Contract*, pp. 262-264; *Gray v. Johnston*, 1928 S.C. 659, where a claim for remuneration for services based on recompense was rejected by the Court.

⁴ *Caddel v. Sinclair*, 1749, Mor. 12416; *Pickin v. Hawkes*, 1878, 5 R. 676.

⁵ *Forbes v. Milne*, 1827, 6 S. 75; *Thomson v. Izat*, 1831, 9 S. 598.

⁶ *Bell's Prin.*, s. 173; *Paterson v. Edington*, 1830, 8 S. 931.

⁷ *Caddel v. Sinclair*, *supra*.

⁸ *Stewart & M'Donald v. M'Call*, 1869, 7 M. 544.

⁹ 54 & 55 Vict. c. 39, Schedule I. ¹⁰ *Dickson on Evidence*, s. 815.

¹¹ *Bell, Com. i.* 346; *Gloag on Contract*, p. 291 *et seq.*

¹² *Gow v. M'Ewan & Son*, 1901, 8 S.L.T. 484.

then the *rei interventus* may be proved by parole, so as to validate the contract.¹ In a contract averred to be for more than one year, it is sometimes difficult to discover whether the acts constituting the *rei interventus* are referable to a contract for a year or a longer period.² With regard to indentures of apprenticeship, it has been held that an apprentice, having entered on his service and continued there for three years, was barred from objecting to the want of legal solemnities of the deed.³

1487. Earnest, or arles, is often given on entering into contracts of service. It is a small sum of money given by one of the parties to the other to make it more evident and certain that a bargain has been completed. The giving of arles does not, like *rei interventus*, validate a contract otherwise incomplete, and it does not bar *locus pœnitentiæ* where that is otherwise competent; but, on the other hand, the giving of them back will not entitle either party to rescind.⁴ Where there is an established and notorious local custom that no contract of service is complete till arles are given, there is *locus pœnitentiæ* till that is done. Arles of small amount were formerly called dead earnest, and are not to be computed part of wages.⁵

(ii) Capacity.

1488. A pupil cannot bind himself, and so cannot enter into a binding contract of service; but though the pupil is free, the other party may be bound if the contract is judged beneficial to the pupil.⁶ A tutor, however, may enter into a binding contract of service on behalf of his pupil, but the contract is reducible on the ground of minority and lesion. Minors are capable of giving consent, but obligations undertaken by a minor with curators, without their consent, are as a general rule null without proof of lesion. It would appear, however, that a contract of service entered into by a minor having a curator is not null because the curator has not consented.⁷ Obligations undertaken by a minor who has no curators, or by a minor who has curators, with their consent, are valid unless they are reduced, on proof of minority and lesion, within four years of the minor reaching majority. If a minor engages in trade, and hires servants or accepts employment in the course of business, he will be bound as if he were of full age, although the contract was entered into without consent of his curator, and he will not be restored on the ground of lesion.⁸ The disabilities which the

¹ *Gibson v. Adams*, 1875, 3 R. 144.

² *Dickson on Evidence*, s. 834; *Napier v. Dick*, 1805, Hume 388; *Gow v. M'Ewan & Son*, 1901, 8 S.L.T. 484.

³ *Rymer v. M'Intyre*, 1781, Mor. 5726.

⁴ *Wallace v. Wishart*, 1800, Hume 383.

⁵ *Fraser, Master and Servant*, 3rd ed., p. 36.

⁶ *Ersk. Inst. i. 7, 33*; and on the whole question of capacity see *Gloag on Contract*, chap. v.

⁷ *M'Feetridge v. Stewarts & Lloyds*, 1913 S.C. 773; *Argo v. Smarts*, 1853, 1 Irv. 250; *Stevenson v. Adair*, 1872, 10 M. 919.

⁸ *Stair*, i. 6, 44; *Ersk. Inst. i. 7, 38*; *Heddel v. Duncan*, 5th June 1810, F.C.; *M'Feetridge v. Stewarts & Lloyds*, *supra*.

common law formerly imposed upon a married woman in regard to contract have now been removed by statute,¹ and she is put in the same position as if she were not married.

1489. Although the contract will not be enforceable against persons who are deficient in capacity, such persons incur liability to pay a fair value for all services which are *in rem versum* to them. This includes all necessary attendance suitable to their degree in life, and all services beneficial to their estate.²

(iii) *Reality of Consent.*

1490. Like other contracts, a contract of service may be vitiated by error, force, or fraud. In England it has been held, in a contract of service, that where there was no fraud, mere non-disclosure of a material fact did not invalidate the contract.³

(iv) *Legality of Object.*

1491. The general law of contract, under which *pacta illicita* will not be enforced by the Courts, applies to the contract of service.⁴ The question has been raised whether a contract of service for life, or a long term of years, is void according to Scots law, as being against good manners and Christian liberty.⁵ The latest authorities seem to hold that there is no restriction by law in the period to which a contract of service may extend,⁶ but it is thought that this proposition must, at the present day, be regarded as open to question.⁷

SUBSECTION (4).—*Duties of Servant.*

(i) *To Enter on and Complete the Service.*

1492. It is the duty of the servant to enter on the service contracted for at the period agreed. If he fails he will be liable in damages. He cannot offer a substitute, as the contract implies a *delectus personæ*.⁸ He must remain in his situation continuously until the contract is terminated without fault on his part. If he deserts his employment, the master may refuse to take him back, his wages may be forfeited, and he would be liable in an action for damages.

(ii) *Care and Skill.*

1493. The servant must know his work and do it carefully. Where a servant of any sort is engaged on the footing that he has the skill and

¹ Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 3.

² Fraser, Master and Servant, 3rd ed., p. 9; Gloag on Contract, p. 92.

³ *Fletcher v. Krell*, 1872, 42 L.J. Q.B. 55.

⁴ Fraser, Master and Servant, 3rd ed., p. 25. See Gloag on Contract, chap. xxx., and ILLEGAL AND IMMORAL CONTRACTS: on the question of the legality of covenants restricting an employee's freedom to engage in other employment, see Gloag (*supra*), p. 669 *et seq.*

⁵ *Caprington v. Gedde*, 1632, Mor. 9454.

⁶ Ersk. i. 7, 62; Fraser, Master and Servant, p. 4.

⁷ Chitty on Contracts, 17th ed., p. 668.

⁸ *Campbell v. Price*, 1831, 9 S. 264.

ability to perform certain duties, the servant guarantees himself to be competent for the service he has undertaken. His obligation is to do the work at the time agreed on, to do it well, to employ the materials furnished by the employer in a proper manner, and, lastly, to exercise all proper care and diligence about the work.¹ Where skill is required in performing the undertaking, then, if the party purports to have skill in the business and undertakes to serve for hire, he is bound to exercise due and ordinary skill in the employment of his art, or, in other words, he undertakes to perform the job in a workmanlike manner.² *Spondet peritiam artis*. It is the party's own fault if he undertakes without having sufficient skill, or if he applies less than the occasion requires.³ The degree of skill and diligence which is required rises also in proportion to the value, the delicacy, and the difficulty of the operation. Goods were sent to a finisher to be finished by a process admittedly delicate, and it was held that the finisher, by accepting the employment, undertook to perform the work without injury to the goods, and that, when they were returned injured, he could only exonerate himself by proving that the injury was due to some defect in the goods, or incapacity in them to undergo the process.⁴ Persons employed as domestic servants are under the same obligations as to the duties of their several employments; but if they give notice, at the time of their engagement, of their want of knowledge of the duties of the employment, the ordinary skill will not be required of them.⁵ The servant must take care of the property of the master, and if he is guilty of gross negligence, whereby the property of his master is injured, he will be liable in an action of damages.⁶ But he is not liable for *damnum fatale* or misadventure.⁷

(iii) *To be Respectful.*

1494. It is the duty of the servant to be respectful to his master. There is no ground which Courts of law have been so uniform in holding a valid reason of dismissal as insolence on the part of the servant.⁸ What conduct amounts to insolence is a pure question of fact; it depends to some extent on the rank of the parties and the nature of the employment—"A speech, therefore, which might justly be deemed insolent when coming from a menial servant to his master will admit of a different construction if addressed to a tradesman by one of his workmen."⁹ But not every lapse on the part of the servant will justify dismissal—"an angry word spoken under provocation, or a disrespectful expression or action apologised for, will not be held sufficient to sanction the

¹ Story on Bailments, s. 430.

² *Ibid.*, s. 431; Bell, Com. i. 459; cf. *Dickson v. The Hygienic Institute*, 1910 S.C. 352; *Free Church of Scotland v. Macknight's Trs.*, 1916 S.C. 349.

³ *Peddie v. Roger*, 1798, Hume 304.

⁴ *Hinshaw & Co. v. Adam*, 1870, 8 M. 933.

⁵ *Gunn v. Ramsay*, 1801, Hume 384.

⁶ *Clydesdale Bank v. Beatson*, 1882, 10 R. 88.

⁷ Fraser, Master and Servant, 3rd ed., p. 68.

⁸ *Ibid.*, p. 70; see *Trotters v. Briggs*, 1897, 5 S.L.T. 17.

⁹ Fraser, Master and Servant, 3rd ed., p. 71; *Edwards v. Levy*, 1860, 2 F. & F. 94.

dissolution of the contract.”¹ The strict rule is that dismissal for insolence entails forfeiture of current wages; but “the Courts endeavour to temper the strict rule of law, and do not necessarily find that a servant has forfeited all claim to past wages, though they may hold the cause assigned sufficient to justify dismissal.”²

(iv) *To Obey Master.*

1495. A servant must obey his master's orders. Disobedience to lawful orders constitutes a breach of contract warranting dismissal and forfeiture of wages.³ A servant is, however, under no obligation to obey—(a) Where the order is to do an act legally or morally wrong, and if he obeys such an order he incurs full responsibility for the consequences.⁴ (b) Where the order relates to services outwith the scope of the engagement.⁵ “But the servant is not entitled to an extremely rigid accounting in this matter with his master, and orders inferring trifling deviations from the line of his duties will form no ground for objection by him if not often repeated.”⁶ If, however, the deviation be great, or though small often repeated, the Court will protect the servant. A cook and housekeeper cannot be reduced to the position of maid, to do merely marketing duties;⁷ nor a head gamekeeper to that of under-gamekeeper.⁸ (c) Where by obedience he would incur a risk not fairly within the contemplation of the contract.⁹ (d) Where the order is to perform services at an unseasonable time. Thus a servant is not bound to work beyond the hours which the usage of the employment sanctions, nor on holidays established by custom,¹⁰ nor on Sundays,¹¹ unless his labour is required for works of necessity¹² and mercy, as in the case of the labour of domestic servants, apothecaries, farm servants,¹³ and watchmen.¹⁴ (e) Where the order is to go furth of Britain, so as to be beyond the protection of British laws, or to go to a distant part of the country without an engagement for his return and an indemnification for time and expense.¹⁵ A domestic servant, however, is bound to accompany his master to any part of the country. Where a servant's work has reference to a place rather than a person, the master cannot remove the servant to a distant place inconvenient to the servant. A

¹ Fraser, *Master and Servant*, 3rd ed., p. 71.

² *Ibid.*, p. 114.

³ *Turner v. Mason*, 1845, 14 M. & W. 112, 116; *A. v. B.*, 1853, 16 D. 269; *Spain v. Arnott*, 1817, 2 Stark. 256; *Silvie v. Stewart*, 1830, 8 S. 1010; *M'Kellar v. Macfarlane*, 1852, 15 D. 246; *Wilson v. Simson*, 1844, 6 D. 1256; *Thomson v. Stewart*, 1888, 15 R. 806.

⁴ *Cullen v. Thomson*, 1862, 4 Macq. 424, 432.

⁵ *Ross v. Pender*, 1874, 1 R. 352; *Moffat v. Boothby*, 1884, 11 R. 501.

⁶ Fraser, *Master and Servant*, 3rd ed., p. 78; Bell's Prin., s. 176.

⁷ *Gunn v. Ramsay*, 1801, Hume 384.

⁸ *Ross v. Pender*, *supra*.

⁹ *Burton v. Pinkerton*, 1867, L.R. 2 Ex. 340; *Turner v. Mason*, 1845, 14 M. & W. at p. 118; Fraser, *Master and Servant*, 3rd ed., p. 79.

¹⁰ *Morrison v. Allardyce*, 1823, 2 S. 387.

¹¹ *Phillips v. Innes*, 1837, 2 S. & M'L. 465.

¹² *Middleton v. Tough*, 1908 S.C. (J.) 32, in which case it was questioned whether the Scots Acts anent Sunday labour were not now in desuetude. See also *Smith v. Beardmore*, 1922 S.C. 131.

¹³ *Wilson v. Simson*, 1844, 6 D. 1256.

¹⁴ *Smith v. Beardmore*, *supra*.

¹⁵ Bell's Prin., s. 180.

spinner or carder who was employed at one mill on a yearly contract of service could not be removed to another mill half a mile distant from her home, belonging to the same master.¹

(v) *To Act Morally.*

1496. It is the duty of a servant to act morally. The master is entitled to demand that all within his household shall act decently, so that the feelings of other members of his household may not be scandalised. All classes of domestic servants, and tutors, governesses, secretaries, and even commercial employees who live with the master, come under his rule. It does not matter whether the immorality take place within or outside the house of the employer, so long as his interests, reputation, or feelings are injured thereby.² In order to justify dismissal, the misconduct must have taken place during the term of service, and a servant is not bound to disclose at the time of entering into the contract any facts in his previous history affecting his character.³ Dishonesty on the part of a servant is a good ground for dismissal.⁴ Intoxication, especially if repeated, also justifies dismissal, and the degree of intoxication necessary depends on the capacity in which the servant is employed and the occasion of the lapse.⁵

(vi) *Not to Injure Master's Interests.*

1497. A servant must do nothing injurious to his master's interests. If a servant wilfully act in such a way that the master is liable to lose the custom of those who employ him, the servant may be dismissed.⁶ If a servant insists that he is a partner, and acts accordingly, the master would have a good ground for dismissing him.⁷ It is not, however, wrong for a servant, who intends to set up business for himself, to make contracts in his master's line of business by way of preparation while still employed as a servant.⁸

SUBSECTION (5).—*Remedies of Master for Servant's Breach.*

1498. As a general rule a master cannot enforce specific performance of a contract of service,⁹ but in the case of certain special employments, *e.g.* an actor, or a public singer, it seems probable that the Court would grant interdict against the artist giving his services to anyone else than the person who employed him during the term of his engagement. For any of the ordinary employments, the master's remedies for the servant's misconduct are dismissal, forfeiture of wages, and damages.

¹ *Anderson v. Moon*, 1837, 16 S. 412.

² *Mathieson v. Mackinnon*, 1832, 10 S. 825; *Greig v. Sanderson*, 1864, 2 M. 1278.

³ *Fletcher v. Krell*, 1872, 42 L.J. Q.B. 55. ⁴ Bell's Prin., s. 178.

⁵ *Edwards v. Mackie*, 1848, 11 D. 67; *M'Kellar v. Macfarlane*, 1852, 15 D. 246.

⁶ *Read v. Dunsmore*, 1840, 9 C. & P. 588; *Malloch v. Duffy*, 1882, 19 S.L.R. 697; *Liverpool, etc., Society v. Houston*, 1900, 3 F. 42.

⁷ *Amor v. Fearon*, 1839, 9 A. & E. 548.

⁸ *Graham v. Paton*, 1917 S.C. 203.

⁹ See *Fraser, Master and Servant*, 3rd ed., p. 101 *et seq.*

If the servant fails to enter, or deserts from, his service, the master is entitled to declare that all current wages are forfeited.¹ What is desertion depends on the circumstances, and the Court will not enforce a harsh rule against the servant. Absence for a day will not entitle the master to dismiss the servant.² But continued absence (although involuntary, if it arises from the servant's fault), if it injures the master's interests and interferes with the due conduct of his affairs, will be sufficient.³ In regard to other cases of misconduct, the master must not be too prompt to take advantage of any slight fault to dismiss a servant. It is his duty to admonish him and give him an opportunity to amend his ways.⁴ If the fault is not a very grave one, the Court, while holding the master entitled to dismiss the servant, may find the wages due for the period that has been actually served. It is sufficient that a master has a good ground for dismissing a servant, although he does not actually state it at the time.⁵ But it would seem that if a servant is dismissed for immorality, he is entitled to know the cause of his dismissal.⁶

SUBSECTION (6).—*Duties of Master.*

(i) *To Receive and Keep Servant in Employment.*

1499. It is the duty of the master to receive the servant into his employment and continue him therein. But whatever would justify the master in dismissing the servant would be a good reason for the master refusing to admit him. The master cannot transfer the services of his servant, as there is a *delectus personæ* on the servant's part as well as on the master's. It depends on the nature of the employment, the circumstances in which it was entered into, and the terms of the agreement whether the assumption of partners by the master will put an end to the agreement.⁷ But where the firm is dissolved, the service is ended, and it depends on the circumstances in which the dissolution took place whether the servant will recover damages or not.⁸

(ii) *Treatment and Care of Servant.*

1500. The master must treat the servant properly, and with due forbearance and moderation. But a servant would not be justified in leaving on account of slight exhibitions of bad temper or disagreeable character on the part of the employer, and each case depends on its special circumstances. At one time it was thought that masters had the right of moderate personal chastisement.⁹ But it is now generally agreed that there is no such right in the case of grown-up servants, and if it exists at all, it is only in the case of apprentices and young persons,

¹ Ersk. iii. 3, 16.

³ *Gibson v. M'Naughton*, 1861, 23 D. 358.

⁴ *Thomson v. Douglas*, 1807, Hume, p. 392.

⁶ *Watson v. Burnet*, 1862, 24 D. 494, per Lord Deas at p. 497.

⁷ See *Campbell v. Baird*, 1827, 5 S. 335.

⁸ See *Termination of the Contract*, para. 1522, *infra*.

² See para. 1520, *infra*, as to sickness.

⁵ Ersk. Prin., s. 182 n.

⁹ Ersk. i. 7, 62.

to whom masters come in the place of parents. If a servant remains in the employment after harsh or cruel treatment by the master, he will be held to have condoned his master's conduct. "Under ordinary circumstances, a domestic servant is not entitled to remain in service for the full period of service, and, at the expiry, to bring up a catalogue of grievances as a ground of damages against her master."¹

1501. A master is bound to provide suitable board and lodging for domestic servants during the period of service. He is not entitled to compel a female servant to reside out of the family while the service continues, the engagement of a female servant being on the faith of the protection of her master's house.² At common law, where there is no special agreement, a master is not bound to provide medical attendance for his servants,³ but this matter now falls under the provisions of the National Insurance Act, 1911.⁴ There may be criminal responsibility incurred by a master in failing to provide suitable food, lodging, and medical attendance for his servants. By 38 & 39 Vict. c. 86, s. 6, it is provided: "Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant is, or is likely to be, seriously or permanently injured, he shall, on summary conviction, be liable either to pay a penalty not exceeding £20, or to be imprisoned for a term not exceeding six months, with or without hard labour."

1502. A master must be careful not to injure the servant's character. If the master accuse the servant of a grave offence which he cannot prove, the servant may quit the service, and may demand wages, board-wages, and damages, according to the circumstances of the case.⁵ But a master's position is privileged, and he is entitled to state the reason when he dismisses the servant for immorality which he believes has been committed. The statement is held not to be actionable unless malice is proved.⁶

(iii) *Giving of Character.*

1503. The master ought to give the servant a character at the end of the service, but this is merely a moral obligation which the law will not compel him to fulfil.⁷ But if the master give a character, it must be true to the best of his knowledge, and if that be so, he will be protected, even if the character be prejudicial to the servant.⁸ A material element in judging of the master's conduct in such a case is the occasion on which the master acted. If he were asked for the character, his position will be very much stronger than if he ultroneously volunteer to give it. But even in the latter case it would seem that the special circumstances

¹ *Fraser v. Laing*, 1878, 5 R. 596, per Lord Pres. Inglis at p. 598.

² Bell's Prin., s. 183.

³ *Fraser, Master and Servant*, 3rd ed., p. 127.

⁴ See INSURANCE.

⁵ *Langmuir v. Thomson*, 1833, 11 S. 571.

⁶ *Watson v. Burnet*, 1862, 24 D. 494; *Dunnet v. Nelson*, 1926 S.C. 764.

⁷ *Fell v. Lord Ashburton*, 12th December 1809, F.C.

⁸ Bell's Prin., s. 188, and cases there cited.

of the case may be so strong as to justify the master's action. Masters should be protected as much as possible if they honestly discharge their duty in speaking of the characters of those servants who have quitted their service.¹

1504. It has not been decided in Scotland whether a master would be liable in damages for giving a false character in the servant's favour, although there does not seem to be any reason for holding that he would not.² A statute has been passed inflicting penalties on all those who give or use a fictitious character, or alter a true character which has already been given.³ Mr. Tait says that the Act "appears, and is understood, not to extend to this country," but to England only. Lord Fraser says: "This doubt does not seem to be well founded. The Act is quite absolute and general, and there is nothing in it to indicate that it was to be restricted in its operation to England."⁴ If the receiver of a character containing defamatory information makes a voluntary disclosure thereof, he may expose himself to an action by the giver of the character on the ground of breach of confidentiality, but this will depend on the circumstances of the disclosure and the conditions under which the character was given.⁵

(iv) *Payment of Wages.*

1505. Wages are the price which the employer has undertaken to pay for the services which the servant has given. Board-wages are not of the nature of hire, and are not implied in the term "wages."⁶ The master is bound to pay the wages at the term stipulated. The servant may have been hired by an overseer, but if the master has received the benefit of his services, he will be bound to pay the hire.⁷

1506. In most trades there is a customary rate of wages, which will regulate the amount in the absence of any agreement. But if the parties have entered on a course of dealing by which the rate of remuneration has been fixed, this standard will be maintained by the Court and will overcome the usage of trade.⁸ If there is no agreement and no custom, the Court will give the servant the value of his services or *quantum meruit*.⁹ If the question is left to the master as to whether any wages are to be paid or not, no action will lie against him if he refuses to pay any;¹⁰ but if the amount only is left to the discretion of the master, the servant will have an action for the fair value of the services rendered.¹¹ On the other hand, if the rate of wages is left in the servant's discretion,

¹ Lord Alvanley in *Rodgers v. Clifton*, 1803, 3 B. & P. 592.

² Cf. *Wilkin v. Reed*, 1854, 15 C.B. 192.

³ 32 Geo. III. c. 56.

⁴ Fraser, *Master and Servant*, 3rd ed., p. 133.

⁵ Cf. *Weld-Blundell v. Stephens*, [1920] A.C. 956; [1919] 1 K.B. 520, per Bankes L.J. at p. 527; *Mushetts v. Mackenzie*, 1899, 1 F. 756, but see the opinion of Lord Young.

⁶ *Cooper v. Henderson*, 1825, 3 S. 435.

⁷ *Nabonie v. Scott*, 1815, Hume 353.

⁸ *Stewart v. Clyne*, 1831, 9 S. 382; 1833, 11 S. 725; affd. 1835, 2 S. & M'L. 45. See also *Mansfield v. Scott*, 1831, 9 S. 780; affd. 1833, 6 W. & S. 277.

⁹ *Wallace v. Geddes*, 1831, 1 Sh. App. 42; *Sinclair v. Erskine*, 1831, 9 S. 487.

¹⁰ Smith, *Master and Servant*, 7th ed., p. 119. ¹¹ *Bryant v. Flight*, 1839, 5 M. & W. 114.

he will not be justified in demanding an exorbitant amount. In a case where the wages were to be paid in victual, and there was an extraordinary rise in price, due to exceptional and unprecedented causes, an equitable adjustment was made by the Court, and the master was not ordained to give specific implement or compensation at current market price of the district.¹ Mr. Bell says that where the amount of wages depends upon the amount of work done, the master is bound to give the workman a full supply of work during the term agreed on.² Lord Fraser says that "this depends on the implied as well as the express terms of the contract," and the master is not bound to provide work unless the agreement is imperative.³

1507. Domestic servants, although engaged for a year, should be paid half-yearly.⁴ With regard to other servants, in the absence of express stipulation, the terms of payment depend on the practice of the parties⁵ or the custom of the kind of service in question. In paying factory employees, a reasonable interval after the completion of the earning period must be allowed to the employer for the preparation of wage lists and for other work incidental to payment.⁶ Should the master fall into arrear with the wages, the servant is entitled to interest on the amount so long as it remains unpaid.⁷

1508. In Scotland, if the servant die during the term of service, the servant's representatives are entitled to wages *pro rata* for the time he has served.⁸ "Salaries" fall under the provision of the Apportionment Act⁹ and are considered as accruing from day to day.¹⁰ With regard to a servant who has been disabled by injuries received in the course of his duty, Mr. Bell thinks that the servant would not forfeit his wages; but Lord Fraser says: "It is thought that the better rule is, that a servant disabled without fault on his part, and without fault on the part of the master, has no claim for wages during disablement, though this may have been caused by injury sustained when in the performance of his work." In the case of the servant's absence from service through sickness, if it be only for a short time, then no deduction will be allowed; but if it be long-continued, then he will lose the right to wages for the period when he is absent.¹¹

1509. On the master's death the contract of service is ended, although the agreement may be for a term of years. The usual rule is to give the servant wages and (where these are due) board-wages till the next term only; but that only if he gets no other employment.¹² If

¹ *Wilkie v. Bethune*, 1848, 11 D. 132.

² *Master and Servant*, 3rd ed., p. 137.

³ *Macgill v. Park*, 1899, 2 F. 272.

⁴ *Mansfield v. Scott*, 1833, 6 W. & S. 277.

⁵ *Bell's Prin.*, s. 179.

² *Bell's Prin.*, s. 192.

⁴ *Bell's Prin.*, s. 184.

⁶ *Sime v. Grimond*, 1920, 1 S.L.T. 270.

⁹ 33 & 34 Vict. c. 35, ss. 2 and 5.

¹⁰ For the meaning of the terms "salary" and "wages" see *Moriarty v. Regents Garage Co.*, [1921] 1 K.B. 423, per Lush J. at p. 430; [1921] 2 K.B. 766.

¹¹ *Fraser, Master and Servant*, 3rd ed., p. 142; *M'Ewen v. Malcolm*, 1867, 5 S.L.R. 62; see as to sickness para. 1520, *infra*.

¹² *Bell's Prin.*, s. 186.

the master dies after the expiry of the time for giving warning, wages are due for another term after the one current, but only under the limitations above stated.¹

1510. In the event of the master's bankruptcy, domestic and farm servants have, by common law, in Scotland a preference for wages for the current term over the other creditors. The privilege is strictly construed to apply to those two classes only, and it was doubted if it extended to gardeners.² Farm-servants included reapers, and even all those employed only for short periods for agricultural purposes. It did not extend to artisans, clerks, brewers, and overseers, who were compelled to rank as common creditors.³ A qualified extension of this privilege, however, has been made to other classes by statute. The Bankruptcy Act, 1913,⁴ provides that the wages or salary of a clerk or servant are preferable in respect of service during four months prior to the date of sequestration or death, but not exceeding the sum of £50 to each individual. The wages of workmen or labourers are preferable in respect of services rendered during two months prior to the said date, up to the sum of £25. Special provision is made as regards a "labourer in husbandry" payable by lump sum, to the effect that the Court shall decide what sum is proportionate for the service rendered up to the said date.

1511. Farm-servants have been held to enjoy a preference for their wages over the landlord's hypothec.⁵ The reason given was that "the crop is created by the labour of the servants, and if they had left the farm there would have been nothing for the landlord; the fund being constituted by their skill and exertions, they are entitled to a preference for their wages."⁶ This ground of decision is not applicable to the case of domestic servants, and it is doubtful whether the privilege extends to them.⁷

1512. A master has no right to retain a servant in his employment and afterwards refuse to pay the wages on the ground of the servant's misconduct in the service. The master's duty is either to dismiss him or to admonish him and pass from the fault.⁸ Where a servant by his misconduct causes loss to his master and the master intimates his intention to deduct the loss from the servant's wages, it would appear that the Court would permit this by way of compensation.⁹ But the loss must arise strictly from the same contract as the demand for wages, and a master will not be entitled to set off an illiquid claim of damages, not arising from the service, against the servant's liquid claim for wages.¹⁰

¹ Fraser, Master and Servant, 3rd ed., p. 144.

² *M'Lean v. Shireffs*, 1832, 10 S. 217.

³ Bell's Prin., s. 1404.

⁴ 3 & 4 Geo. V. c. 20, s. 118.

⁵ *M'Glashan v. Duke of Atholl*, 29th June 1819, F.C.

⁶ Lord Hermand's opinion, given in *Bell on Leases*, i. 415 n.

⁷ But see Fraser, Master and Servant, 3rd ed., p. 149.

⁸ *Tait v. Mackintosh*, 26th February 1841, F.C.; *Fraser v. Lang*, 1831, 9 S. 418.

⁹ Lord Justice-Clerk Inglis in *Scottish North-Eastern Rly. Co. v. Napier*, 1859, 21 D. 700.

¹⁰ *Pegler v. Northern Agricultural Co.*, 1877, 4 R. 435; *Logan v. Stephen*, 1850, 13 D. 262. On the question of deductions from wages generally, see MASTER AND SERVANT.

(v) *Prescription of Wages.*

1513. By the Act 1579, c. 83, it was enacted "that all actions of debt for house maills, men's ordinaries, servant's fees, merchants' accounts, and others the like debts that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action, except he either prove by writ or by oath of his party." This Act applies to wages of all kinds of servants, both superior and inferior. Each term's wages runs a separate course, the *terminus a quo* being the date of payment.¹ If the servant's failure timeously to claim wages is induced by wrongful conduct on the part of his employer the Act will not apply.² To raise the plea of prescription, all that is necessary is that the claim should be denied and the plea of prescription taken, and the other party will then be compelled to prove by writ or oath the constitution of the debt and that it is resting-owing.³

(vi) *Arrestment of Wages.*

1514. At common law a servant's wages, being alimentary, could not be arrested by his creditors, except as to the surplus over what was necessary for his maintenance.⁴ What is necessary depends on the varying conditions and circumstances of each case.⁵ It is not competent to arrest wages upon the dependence of any action raised under the Small Debt Acts.⁶ By statute⁷ the wages of all labourers, farm-servants, manufacturers, artificers, and workpeople are free from arrestment, except in so far as they exceed thirty-five shillings per week. But the statutes in no way affect arrestments in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law. According to the ordinary rule of construction, the general expression "work-people" will apply to persons *ejusdem generis* with the classes mentioned in the Act. Hence it will not include shopmen, clerks, domestic servants, etc., who will remain under the rule of the common law. There is no reason why the Act should not apply to persons employed by the piece or job.⁸ The remuneration of holders of public offices under the Crown is immune from arrestment, and this exception extends to the wages of an ordinary workman in the employment of a Government department.⁹

SUBSECTION (7).—*Servant's Remedies on Master's Breach.*

1515. If the master commits any of the breaches of contract which have already been referred to, the servant may leave the master's

¹ Bell's Prin., ss. 628, 629.

² *Inglis v. Smith*, 1916 S.C. 581.

³ For examples where the Act has been applied, see Bell's Prin., ss. 628, 629; *Miller v. Miller*, 1898, 25 R. 995; *Neilson v. Mags. of Falkirk*, 1899, 2 F. 118; and see PRESCRIPTION.

⁴ *Bogg v. Davidson*, 1668, Mor. 10380; Stair, iii. 1, 37; Ersk. iii. 6, 7.

⁵ *Shanks v. Thomson*, 1838, 16 S. 1353.

⁶ 8 & 9 Vict. c. 39.

⁷ 33 & 34 Vict. c. 63; 14 & 15 Geo. V. c. 16, s. 2.

⁸ *M'Murphy v. Elmslie*, 1888, 15 R. 375.

⁹ *Mulvenna v. The Admiralty*, 1926 S.C. 842. On arrestment of wages generally, see ARRESTMENT, Vol I. p. 543, *ante*.

service and raise an action for damages. If the master wrongfully dismisses the servant or refuses to receive him, the proper remedy is an action for damages, and not for the wages which the servant was prevented from earning.¹ The servant is not bound to return to the service if he has been improperly dismissed, and therefore it is no answer to his claim that the master is willing to receive him back. The contract of service will not be specifically enforced against the master, but the servant may have a claim for wages, board-wages, and damages.² Where a person is the holder of a public office, he may claim to be restored if he be improperly ejected from it.

1516. As a general rule the Court will tax the amount due in reparation of a wrong done through the breach of contract by the master at the wages and board-wages which the servant can claim under the contract. But this is not necessarily the case, and in slighter cases of injury the Court will give less, while in graver they may give more. The master "will be subjected in such damages as, in the whole circumstances of the case, appear reasonable."³ The damages which a servant recovers must be for loss which is directly the consequence of the master's act. The authorities differ on the question whether a servant is bound to look for other employment, so as to lessen the claim for damages by mitigating the injury which he has sustained. Recent cases seem to lay down that he is bound to work if he can obtain employment.⁴ The master's bankruptcy is a breach of the contract of service, and the servant is entitled to damages.⁵ But in this case a servant is bound to look out for other employment, and can only recover the difference between his wages under the contract and what he has earned elsewhere.⁶ The fact that a servant, improperly dismissed, leaves without claiming compensation does not bar his remedy.

SUBSECTION (8).—*Master's Liability for Servant's Acts.*⁷

1517. A master may be liable for the servant's contracts entered into with third parties on his behalf. This liability depends on the question whether the master has in express terms, or by implication, given to the servant a mandate to act on his behalf, and the principle on which it rests is *qui facit per alium facit per se*.⁸ Where the master has given an express mandate, there can be no doubt about his liability for the contracts made by the servant. But even where there is no express mandate, one may be implied by his conduct and course of dealing. Thus where a master ran weekly accounts for bread, and the servant extended

¹ *Cameron v. Fletcher*, 1872, 10 M. 301. ² *Mason v. Scott's Trs.*, 1836, 14 S. 343.

³ *Fraser, Master and Servant*, 3rd. ed., p. 163; but see *Campbell v. M'Lachlan*, 1896, 4 S.L.T. 143; *Mollison v. Baillie*, 1885, 22 S.L.R. 595.

⁴ *Ross v. Pender*, 1874, 1 R. 352.

⁵ *Hoey v. M'Ewan & Auld*, 1867, 5 M. 814, per Lord Pres. Inglis at p. 817.

⁶ *Bell's Prin.*, s. 185.

⁷ See AGENCY, Vol. I. p. 194, *ante*, and with regard to the master's liability for his servant's delict, see NEGLIGENCE.

⁸ See *Morrison v. Statter*, 1885, 12 R. 1152.

the accounts to a longer period, the master was held liable, although he had given the servant money to pay the weekly account.¹ But where a bachelor gave his servant £1 weekly to provide meat and vegetables, and the servant, after some ready-money purchases, opened an account which ran on for sixteen months, the master was held not liable in payment of the butcher's account.² The same doctrine has been laid down in England.³ Again, unless the master had been in the habit of employing the tradesmen in the way of his trade, it should not be in the power of a servant to bind him to contracts of which he had no knowledge and to which he gave no assent.⁴ If a master has ordered goods on credit from a tradesman, and the servant has ordered further goods, the master will be held liable, although the goods were ordered without his assent, or even against his orders privately given to the servant.⁵ The master must give due warning to the tradesman not to supply the servant. A master will be held liable if he use the article ordered by the servant, and if it lay within the scope of the servant's authority to enter into such contracts. It may not be easy to determine whether a particular contract falls within the implied authority of a servant, and each case will depend on its own circumstances.⁶ The master's death operates as a revocation of the servant's mandate, but the representatives will be held bound by contracts entered into by the servant in ignorance of his master's death.⁷

SUBSECTION (9).—*Servant's Liability for his Contracts.*

1518. So long as a servant keeps within the limits of his mandate, he is not liable (unless he is the master of a ship, for furnishings supplied to it) for contracts entered into by him on his master's behalf. But a servant, like any other agent, treating with the other party as principal, and not disclosing that he is only a servant, will be liable personally. So also if he, in contracting in his master's name, goes beyond the master's commission, he will be liable personally to anyone dealing with him in the *bona fide* belief that he is acting within his master's authority.⁸

SUBSECTION (10).—*Termination of the Contract.*

1519. The contract may be ended in the normal way, by the expiration of the period of service, accompanied by due warning by one of the parties that he does not intend to renew it.⁹ A servant dismissed on due warning has no action of damages against his master even if he

¹ *Oliver v. Grieve*, 1792, Hume 319.

² *Mortimer v. Hamilton*, 1868, 7 M. 158.

³ *Stubbing v. Heintz*, 1791, Peake's N.P.C. 47.

⁴ Lord Ellenborough in *Hiscox v. Greenwood*, 1802, 4 Esp. 174.

⁵ Ersk. iii. 3, 33.

⁶ Fraser, Master and Servant, 3rd ed., p. 256; *Montgomery v. North British Rly. Co.*, 1878, 5 R. 796; *Ord v. Gemmell & Son*, 1898, 1 F. 17.

⁷ Ersk. iii. 3, 41; Bell, Com. i. 525.

⁸ Bell, Com. i. 540.

⁹ See para. 1482, *supra*.

offers to prove that his master was actuated by malice.¹ The contract may also be ended earlier by consent, express or implied. This may be inferred from the conduct of the parties.² If a servant resigns a situation and the master accepts the resignation, the servant cannot withdraw the resignation, even if it be done within a few minutes after offering it.³

1520. The death of the servant puts an end to the contract, as both parties must be held to have contemplated the servant's life and health as a condition of the contract. Mr. Bell says sickness or inevitable accident "will excuse non-performance for a short time, but if the inability should continue long, and a substitute should be required, the master will be discharged from his counter-obligation to pay wages."⁴ Everything depends on the circumstances of each case.⁵ The master cannot seize on every illness—for example, one lasting only for a few days—as an excuse for rescinding the contract, but where the illness is long-continued and interferes with the conduct of the master's affairs, rescission of the contract will be justified.⁶ If the sickness be due to the servant's misconduct during the employment, he cannot exact more wages than for the time he has served, and cannot demand that the master should keep him in his employment.⁷

1521. If the servant is imprisoned, even without fault of his own, the master may, as in the case of sickness, be liberated from the contract. If the servant is found guilty of crime, and imprisonment follows, he will be liable in damages to the master, as it was through his fault that the contract of service was broken. If, however, he is imprisoned through no fault of his own, for a crime of which he is ultimately acquitted, he will not be liable in damages.⁸ A servant cannot be dismissed because of entering upon marriage, provided he or she is willing to fulfil the contract by serving as formerly. But if the servant breaks an engagement in order to marry, the master will be entitled to claim damages. The Army Act⁹ deals with civil process which is competent against a soldier. It would seem from it that a master cannot reclaim a servant who has enlisted, but the servant may be liable in damages or at least in forfeiture of wages.¹⁰

1522. The death of the master terminates the contract of service, even though by the agreement it was to last for a term of years. In Scotland the servant is entitled to remain till the next term, and till then the executors are entitled to his services.¹¹ The servant of a firm which is dissolved by the death of one of the partners is not bound to

¹ *Brown v. Mags. of Edinburgh*, 1907 S.C. 256.

² *Ferguson v. M'Kenzie*, 1815, Hume 21, and *Robinson v. Smith & Co.*, 1800, Hume 20; but see *Campbell v. M'Kenzie*, 1887, 24 S.L.R. 354.

³ *Peter v. Glasgow Millboard Co.*, 1875, 13 S.L.R. 127.

⁴ Bell's Prin., s. 179.

⁵ For illustrative cases see Fraser, Master and Servant, 3rd ed., pp. 316 *et seq.*; *Robinson v. Davison*, 1871, L.R. 6 Ex. 269.

⁶ *Manson v. Downie*, 1885, 12 R. 1103.

⁷ *M'Ewen v. Malcolm*, 1867, 5 S.L.R. 62.

⁸ Fraser, Master and Servant, 3rd ed., p. 322.

⁹ 44 & 45 Vict. c. 58, s. 144, as amended.

¹⁰ See ARMED FORCES OF THE CROWN, Vol. I. p. 498, *ante*.

¹¹ *Hoey v. M'Ewan & Auld*, 1867, 5 M. 818.

remain in the employment of the surviving partners, nor are they bound to employ him.¹ If the firm come to an end through bankruptcy or by voluntary dissolution, the contract is at an end, but the company may be liable in damages.²

1523. The contract may be terminated by the course of events. Thus it may happen in certain contracts that the occasion for the service having disappeared, the contract may be brought to an end. A tutor hired to teach a child, though his contract may be for a term certain, would have no right to damages should the child die and his service be thus terminated. The contract of service is subject to the general rules of contract in regard to frustration and illegality. Accordingly, where the contract becomes illegal or impossible by operation of law, the contract may be terminated.³

SUBSECTION (11).—*Consequences of Termination of Contract.*

1524. When a servant is discharged he is bound to leave the service quietly.⁴ When a servant has been provided with clothes these remain the property of the master, whether they be plain clothes or livery.⁵ The servant is bound to leave the premises, and if he does not, the master may turn him out and remove his effects without process of law,⁶ or may interdict him.⁷

SECTION 3.—HIRING OF CUSTODY.

SUBSECTION (1).—*The Contract Generally.*

1525. By this contract, which is one of the species of *locatio-conductio operis*,⁸ one party undertakes for hire to receive the property of another into his custody, and to bestow upon it due care and attention, so that it may remain in safety. The custodian is bound in ordinary diligence. He must, in other words, shew the same degree of care towards the goods entrusted to him as a diligent and prudent man would shew in regard to his own property.⁹ If the custodian delegates the care of the thing to a servant, he is answerable for the servant's failure in performance, and it is doubtful to what, if any, extent the defence that the servant was acting outwith the scope of his employment is available

¹ *Hoey v. M'Ewan & Auld*, 1867, 5 M. 818.

² *Arrol v. Todd*, 1881, 18 S.L.R. 673; *Ross v. M'Farlane*, 1894, 21 R. 396; *Wilson v. Scott, Bell & Co.*, 1900, 8 S.L.T. 10; *Day v. Tait*, 1900, 8 S.L.T. 30.

³ See CONTRACT, Vol. IV. p. 457, *ante*.

⁴ *Ross v. Pender*, 1874, 1 R. 352.

⁵ *Shiells v. Dalyell*, 1825, 4 S. 134.

⁶ *Scott v. M'Murdo*, 1869, 6 S.L.R. 301; *Sinclair v. Tod*, 1907 S.C. 1038.

⁷ *First Edinburgh, etc. Society v. Munro*, 1884, 21 S.L.R. 291.

⁸ The other varieties of the contract *locatio-conductio operis* are treated under separate headings (e.g. CARRIAGE BY LAND, CARRIAGE BY SEA).

⁹ Story on Bailments, 4th ed., p. 449; Bell, Com. i. 488; *M'Lean v. Warnock*, 1883, 10 R. 1052, at p. 1054; *Central Motors, Ltd. v. Cessnock Garage Co.*, 1925 S.C. 796, at p. 800; *Coldman v. Hill*, [1919] 1 K.B. 443. But note the special liability of stablers under the edict, *infra*, para. 1532.

to the custodian.¹ The subject may be considered under the following heads:—wharfingers, warehousemen, livery stablers, and persons who keep fields for depasturing cattle.

SUBSECTION (2).—*Wharfingers.*

1526. It has sometimes been said that the liability of wharfingers is the same as that of common carriers, but the better view is that they are liable to the same extent as warehousemen, namely, in ordinary diligence only.² If the wharfinger employs his own men to unload the vessel, he will be liable for any loss caused by their negligence.³ A wharfinger who keeps goods for a long period of time without charge, but under an arrangement whereby he is ultimately to deliver them in his own barges, will not be held to be acting gratuitously, as his profit will come from the freight when the goods are ultimately placed on board for transit.⁴ A wharfinger who undertakes to see that a ship is safely berthed in a harbour will be liable for any damage to the ship owing to its not being securely placed.⁵ Delivery to a wharfinger who usually has charge of the buyer's stock, and whose acts in accepting delivery have frequently been acknowledged by the buyer, is held to be equivalent to delivery into the buyer's warehouse.⁶

1527. The wharfinger's responsibility begins as soon as the goods are landed on the wharf, or put out of the hands of the carrier or porter for embarkation.⁷ But there must be some act or assent on his part, or on that of his servants or agents, to the custody thereof, before he will be deemed to have assumed the character of custodian.⁸ His store and wharf must be free from all things likely to hurt property,⁹ and in the event of any loss it lies on him to acquit himself by shewing he was not in fault.¹⁰ If a wharfinger with whom goods have been lodged, carelessly makes a representation that the goods are in his warehouse, whereas as a matter of fact they have been lost, he will be liable in an action of damages for the value of the goods to any person who has bought the title to the non-existent property.¹¹ If he is clothed merely with the custody of the goods, and the duty of shipping them devolves by custom on the master of the ship to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf.¹² In other cases the wharfinger's responsibility may include the shipping of the

¹ *Central Motors, Ltd. v. Cessnock Garage Co.*, 1925 S.C. 796, at p. 801, and cf. *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716; but see *Cheshire v. Bailey*, [1905] 1 K.B. 237. Of course a custodian may relieve himself from liability for his servant's negligence by express stipulation, see, e.g., *Rutter v. Palmer*, [1922] 2 K.B. 87.

² *Bell, Com. i. 497*; *Story on Bailments*, p. 457.

⁴ *White v. Humphrey*, 1847, 11 Q.B. 43.

⁶ *Bell, Com. i. 216.*

⁸ *Story on Bailments*, p. 460.

¹⁰ *Chitty on Contracts*, 17th ed., p. 49; *Bell, Com. i. 488.*

¹¹ *Seton v. Lafone*, 1887, 19 Q.B.D. 68.

³ *Bell, Com. i. 606.*

⁵ *Chitty on Contracts*, 17th ed., p. 499.

⁷ *Bell's Prin.*, s. 156.

⁹ *Bell, Com. i. 488.*

¹² *Cobban v. Downe*, 1803, 5 Esp. 41.

goods, and in such cases he must hand them over to the proper official on board.¹

SUBSECTION (3).—*Warehousemen.*

1528. A warehouseman has much the same responsibility as a wharfinger for goods placed in his charge for safe custody, and is bound to take common and reasonable care of the commodity entrusted to his charge.² He is not liable for loss by mere accident not attributable to his own wilful misconduct.³ His warehouse must be safe, free from danger of fire, vermin, or any other risk which would endanger the goods placed in it.⁴ If he has taken all reasonable precautions, he will not be responsible for the loss of the goods, as he does not, like a carrier, insure their safety.⁵ The liability of the warehouseman begins as soon as the goods arrive and the crane of the warehouse is applied to raise them into the warehouse, and it is no defence that they are afterwards injured by falling into the street, through breaking of the tackle, even if the carman who brought them refused the offer of slings for further security.⁶

1529. Warehousemen are responsible for the innocent mistakes of themselves or their servants in making a delivery of goods to persons not entitled to them.⁷ If the goods are injured while in the possession of a warehouseman through his fault, he will be liable in damages, even although subsequently the goods are completely destroyed without his fault, as by fire, flooding, or other inevitable accident.⁸

1530. A railway company is only liable as an ordinary warehouseman for luggage deposited at the left luggage office. The company may modify the terms on which it receives articles by conditions printed on the ticket. There is, however, no rule or presumption of law that a person is bound by the conditions in the document handed to him, and it is a question of fact in each case whether the printed conditions form part of the contract of deposit or not.⁹ In order to make such conditions binding upon a person depositing luggage it must be shewn either that they were, in fact, brought to his notice, or that the company did what was reasonably sufficient to bring them to his notice.¹⁰ Where luggage has been handed over to the proper official and has subsequently been lost owing to failure of the company's servants to place it in the left luggage office, questions have arisen as to whether the conditions on the ticket (*e.g.* a limitation of the company's liability) apply. In

¹ Addison on Contracts, 11th ed., p. 865. ² *Snodgrass v. Ritchie*, 1890, 17 R. 712.

³ *Cordey v. Curdiffe Pure Ice Co.*, 1903, 88 L.T. 192; *Garside v. Trent and Mersey Navigation*, 1792, 4 T.R. 581; *In re Webb*, 1818, 8 Taun. 443.

⁴ *Lampson v. London and India Dock Co.*, 1901, 17 T.L.R. 663; Bell's Prin., s. 155.

⁵ *Cailiff v. Danvers*, 1792, Peake 114; Story on Bailments, p. 451.

⁶ *Thomas v. Day*, 1803, 4 Esp. 262.

⁷ *Lubbock v. Inglis*, 1815, 1 Stark. 104.

⁸ Story on Bailments, p. 456.

⁹ *Henderson and Ors. v. Stevenson*, 1875, 2 R. (H.L.) 71; *Lyons v. Caledonian Rly. Co.*, 1909 S.C. 1185; 2 S.L.T. 78.

¹⁰ *Parker v. South-Eastern Rly. Co.*, 1877, 2 C.P.D. 416; *Williamson v. North of Scotland Navigation Co.*, 1916 S.C. 554; *Hood v. Anchor Line, Ltd.*, 1916 S.C. 547; 1918 S.C. (H.L.) 143; *Morris v. Clan Line (O.H.)* 1925, S.L.T. 321.

one case it was held that the conditions had no application until the luggage was in fact warehoused,¹ and in another, where the terms were different, it was held that the conditions applied from the time of handing over the luggage.²

1531. Both wharfingers and warehousemen occasionally act also as common carriers. In such cases it is sometimes difficult to determine the extent of their liability, since the responsibility of a common carrier is of a higher degree. If the carrier receives the goods into his own warehouse, for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and the goods are lost or injured, his responsibility as carrier begins with the receipt of the goods.³ But if he receives goods into his warehouse to be forwarded according to the future orders of the owners, and the goods are lost or injured before these orders are received, he is not liable as a common carrier, but only as a warehouseman. Until the duty as carrier is ended he will be responsible as a common carrier, notwithstanding he acts as a warehouseman in the same transaction. Thus if the deposit in the warehouse be in some intermediate place in his route,⁴ or if after arriving at the destination he places the goods in his warehouse till, in accordance with his duty as carrier, he can deliver them to the owner, he will be liable for loss as carrier.⁵ But when the goods have arrived at their fixed destination, and are placed in the carrier's warehouse to await the owner's convenience in sending for them, or for the purpose of being forwarded by another carrier to some other place, then his duty as carrier ceases and his duty as warehouseman begins.⁵

SUBSECTION (4).—*Stablers.*

1532. If an innkeeper receive the horse of a traveller into his stables, he is liable for any loss or damage to the horse, or its furniture, or goods on its back, proceeding from any cause except inevitable accident,⁶ and the onus of proving that the loss did so arise lies upon the innkeeper. This responsibility arises from the edict *nautæ, caupones, stabularii*, which has been imported into our law.⁷ The term *stabularii* includes all livery stablers, whether attached to an inn or not, but it is doubtful whether it extends to the keeper of a motor garage.⁸ It seems doubtful

¹ *Handon v. Caledonian Rly. Co.*, 1880, 7 R. 966.

² *Lyons v. Caledonian Rly. Co.*, 1909 S.C. 1185, and cf. *Harris v. Great Western Rly. Co.*, 1876, 1 Q.B.D. 515.

³ *Hyde v. Trent and Mersey Navigation Co.*, 1793, 5 T.R. 389.

⁴ *Forward v. Pittard*, 1785, 1 T.R. 27.

⁵ *Rowe v. Pickford*, 1817, 8 Taun. 83; *In re Webb*, 1818, 8 Taun. 343; cf. *Chapman v. Great Western Rly. Co.*, 1880, 5 Q.B.D. 278.

⁶ As to what constitutes inevitable accident or the "act of God" see *Mustard v. Paterson*, 1923 S.C. 142, per Lord Hunter at p. 153.

⁷ *Chisholm v. Fenton*, 1714, Mor. 9241; *Hay v. Wordsworth*, 1801, Mor. "Nautæ," etc., App. 1; see Bell, Com. i. 498; Stair, i. 13, 3; More's Notes, lvii.

⁸ *Mustard v. Paterson*, 1923 S.C. 142; *Central Motors v. Cessnock Garage Co.*, 1925 S.C. 142.

whether the edict would apply to livery stablers who receive horses for the purpose of training or to be kept for a considerable period of time.¹ It was held that a stabler who had, for the purpose of training it, received a young horse into a stable, under which he was aware that a railway company were forming a tunnel by blasting rock, and who had not communicated that circumstance to the owner of the horse, was liable for injury done to it in consequence of a fright occasioned by an explosion in the tunnel.²

SUBSECTION (5).—*Pasturage of Cattle.*

1533. Those who keep fields for depasturing cattle are liable for ordinary diligence only.³ This contract in England is called a contract of agistment. He who lets out fields for pasture must shew ordinary skill in managing cattle, and also that he has exhibited due care in the safe keeping of cattle entrusted to him.⁴ He is not liable if the cattle are stolen without his default, but he has a duty to take reasonable steps to secure their recovery.⁵ The grazing field must be properly secured against the escape of the cattle, and free from pitfalls and dangers which may lame or injure them.⁶ A horse which had been sent to be grazed for hire upon a farm was killed by falling into a hole in the field in which it was placed, which was situated over old mineral workings. The hole was proved to have been noticed for some time before the accident by several persons resident in the neighbourhood, and it was held that the farmer was liable in damages for the loss, as he had failed to take that reasonable care of property placed in his custody which a prudent man would have taken of his own.⁷ If he leave the gate open, or the fences are defective and the cattle are lost, he will be liable to make good the loss.⁸ If he place the cattle in a field where they are exposed to infection from diseased cattle, or to the attack of a mischievous animal, he will be liable for the loss.⁹

SUBSECTION (6).—*Lien of Custodian for Hire.*

1534. The general rule of the Scottish law is that in all contracts "there results to the possessor of the goods a right to retain them for the price of his labour, and the expense advanced upon them while in his keeping, and in the fair line of his employment or trust."¹⁰ Accordingly it would seem that each of the custodians for hire who have been referred to has a right of retention for the agreed-on price of the care

¹ *Trotter v. Buchanan*, 1688, Mor. 10080.

² *Laing v. Darling*, 1850, 12 D. 1279; see also *Hagart v. Inglis*, 1832, 10 S. 506.

³ *Sutherland v. Hutton*, 1896, 23 R. 718.

⁴ *Davidson*, 1749, Mor. 10081; Bell, Com. i. 488, 489.

⁵ *Coldman v. Hill*, [1919] 1 K.B. 443.

⁶ Bell, Com. i. 488.

⁷ *M'Lean v. Warnock*, 1883, 10 R. 1052.

⁸ *Broadwater v. Blot*, Holt's N.P.C. 547; 17 R.R. 677.

⁹ *Robertson v. Connolly*, 1851, 13 D. 779; 14 D. 315; Chitty on Contracts, 16th ed., p. 468.

¹⁰ Bell, Com. ii. 93.

and custody bestowed upon the specific articles or cattle.¹ In order to justify a claim for a general right of retention, the custodian must prove a special agreement or usage and custom of trade which is public and notorious.² There is no general lien to storekeepers³ or scourers.⁴ A consignee having deposited for custody with the proprietors of a warehouse certain goods consigned to him, but without intimating that they were not his property, and the owners of the warehouse having subsequently made advances to him, but not specially on the faith of the goods, or with relation to them, and the consignee having become bankrupt, it was held that the proprietors of the warehouse were not entitled to retention against the true owners till satisfied of their advances to the consignee.⁵

¹ But for the bailee's right to lien in England see, e.g., *Forth v. Simpson*, 1849, 13 Q.B. 680; *Hatton v. Car Maintenance Co.*, [1915] 1 Ch. 621, from which it would appear that mere custody, apart from expenditure of labour or services on the goods, did not as a general rule confer a lien.

² Bell, Com. ii.—Special Lien to Innkeepers for Stabling, 99; *Stablers and Grassmail*, 100; General Lien to Wharfingers in England, 103.

³ *Laurie & Co. v. Anderson*, 1853, 15 D. 404.

⁴ *Smith v. Aikman*, 1859, 22 D. 344.

⁵ *Stuarts & Fletcher v. M'Gregor*, 1829, 7 S. 622; for the effect upon lien of a limitation in the title of the person depositing the goods, see generally *Lamonby v. Foulds*, 1928 S.C. 89, and contrast *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307.

HOLIDAYS.

See BANK; FACTORIES AND WORKSHOPS.

HOLOGRAPH WRITINGS.

See DEEDS (EXECUTION OF).

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See CRIME.

HOMOLOGATION.

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SECTION 1.—DEFINITION.

1535. Homologation has been defined as “that assent or approbation of a deed, conveyance, settlement, or contract, which is inferred from circumstances; supplying, in the case of the obliger or granter, the want of legal evidence of consent, and establishing as a recognised engagement a contract defectively entered into, or giving sanction and effect to a conveyance or settlement against which exception might be taken.”¹ If this definition be accurate, it would appear that the doctrine rests upon the principle that when a man gives out and acts upon his deed as regular and binding, he is barred from taking exception to it on the ground of latent nullities for which he is responsible.² Bell goes on to observe³ that “homologation may be either by the subsequent approbation of the granter or maker of the obligation, deed, or settlement; or by the acquiescence of one who, having an interest adverse to it, confirms what has been done. Homologation of the former kind bars *locus pœnitentiæ*; homologation of the latter bars all exception otherwise competent. When the original party homologates, he either ratifies a deed or obligation already executed, but imperfectly, or he adopts and gives effect to what would otherwise be null.”⁴ It is to be observed that Erskine limits the application of the principle to obligations arising *ex natura* or *ex contractu*.⁵

SECTION 2.—WHO MAY HOMOLOGATE.

1536. Assent is of the essence of homologation; and consequently

GENERAL AUTHORITIES.—Dickson on Evidence, ss. 850–866; More, Notes to Stair, 67 *et seq.*; Bell, Com. i. 189–194; Menzies, Convey., 183 *et seq.*

¹ Bell, Com. i. 144.

² *Smith v. Bank of Scotland*, 1824, 2 Sh. App. 265, at p. 282; *Earl of Fife v. Duff*, 1825, 4 S. 335; *M'Dougall's Exr. v. Wighton*, 1830, 9 S. 12.

³ Bell, Com. i. 145; Bell's Prin., s. 27; cf. Ersk. Inst. iii. 3, 47; Ersk. Prin. iii. 3, 15; *Callender v. Callender's Trs.*, 1863, 2 M. 291.

⁴ See *Gall v. Bird*, 1855, 17 D. 1025, and para. 1541, *infra*.

⁵ Ersk. iii. 3, 47. See *Callender v. Callender's Trs.*, *supra*.

only he who is capable of legal obligation can homologate.¹ Deeds granted by a minor without consent of his curators² may be homologated by the granter on attaining full legal capacity,³ and the same rule formerly applied to a married woman.⁴ A deed may be homologated not only by the granter but by his agent⁵ or his executor.⁶

SECTION 3.—OBLIGATIONS TO WHICH APPLIED.

1537. The principle has been applied to deeds open to exception on the ground of fraud⁷ or impetration *vi et metu*.⁸ While a deed intrinsically null, *e.g.* if forged⁹ or vitiated *in substantialibus*¹⁰ or signed by an idiot or lunatic, cannot be homologated, it may be adopted.¹¹ So too an improbate testamentary writing may be adopted by the granter by reference to it in a probative deed.¹² If the contract or obligation be one and indivisible, a partial approbatory act will set up the whole.¹³ And the same result follows even if it be divisible unless the person concerned protest that his act is to be taken as limited in application.¹⁴

SECTION 4.—IMPLIED HOMOLOGATION.

SUBSECTION (1).—*Actings which infer Homologation.*

1538. Homologation may be express or implied.¹⁵ Thus the acknowledgment by the granter of a trust-deed of the actings of the trustee thereunder has been held to remove objections to it on the ground of

¹ *Morton v. Young*, 11th February 1813, F.C.; *Rose v. Rose*, 1821, 1 S. 154; *Brodie v. Brodie*, 1827, 5 S. 900; *Stein's Assignees v. Brown and Gibson Craig*, 1831, 5 W. & S. 47; *Harkness v. Graham*, 1833, 11 S. 760; *M'Gibbon v. M'Gibbon*, 1852, 14 D. 605; *Sanders v. Sanders' Trs.*, 1879, 7 R. 157.

² *Hume v. The Lord Justice-Clerk*, 1671, Mor. 5688; *Forrest v. Campbell*, 1853, 16 D. 16; see *Harkness v. Graham*, *supra*.

³ *Brodie v. Brodie*, *supra*.

⁴ *Mitchell v. Cunningham*, 1672, Mor. 5711.

⁵ *Mitchell v. Scott's Trs.*, 1874, 2 R. 162; *Grant v. Baillie*, 1830, 8 S. 601; cf. *Telfer v. Hamilton*, 1735, Mor. 5657.

⁶ *M'Calman v. M'Arthur*, 1864, 2 M. 678.

⁷ *Dunbar v. Bishop of Murray*, 1672, 1 Br. Supp. 649; *Rig v. Durward*, 1776, Mor. 5672; *Mor. App. "Fraud"* No. 2; *M'Michan v. M'Michan*, 1839, 1 D. 1085.

⁸ *Grant v. Anderson*, 1706, Mor. 16509.

⁹ See *Mackenzie v. British Linen Co.*, 1880, 7 R. 836; 1881, 8 R. (H.L.), 8, and cases there cited.

¹⁰ *Robertson v. Ogilvie's Trs.*, 1844, 7 D. 236, at p. 244; *Grants v. Shepherd*, 1847, 6 Bell's App. 153; *Boswell v. Boswell*, 1852, 14 D. 378; see *Dickson on Evidence*, ss. 856-859.

¹¹ *Ersk. iii.* 3, 47; *Bell, Com. i.* 145; *Gall v. Bird*, 1855, 17 D. 1027; *British Linen Co. v. Cowan*, 1906, 8 F. 704; *Dickson on Evidence*, s. 854.

¹² See *DEEDS*, Vol. V. p. 468, *ante*; *Callender v. Callender's Trs.*, 1863, 2 M. 291.

¹³ *Steel v. Steel*, 1774, Mor. 5669; cf. *Erskine v. Erskine*, 1682, Mor. 5703.

¹⁴ *Murray v. Murray*, 1671, Mor. 5689; cf. *Muir v. Stirling*, 1663, Mor. 6107; *Hume v. The Lord Justice-Clerk*, 1671, Mor. 5688; *Carmichael v. Carmichael's Trs.*, 1823, 2 S. 198; cf. *Dow v. Beith*, 1856, 18 D. 820.

¹⁵ *Stair, i.* 10, 11; *Ersk. iii.* 3, 48; *Bell, Com. i.* 145.

ineffective delivery and *ultra vires*.¹ So, too, effect has been given to an improbativ receipt treated by the granter's executor as a valid document of debt,² and to a marriage contract imperfectly executed upon which marriage had followed.³ In regard to the class of instruments last mentioned Lord Gillies observed that "when a marriage has been solemnised on the faith of an antenuptial contract . . . there must be actual forgery of the deed libelled to make the ground of reduction relevant."⁴ The principle of implied homologation has been applied in the case of an heir of entail challenging the deeds under which he had possessed and claimed enrolment;⁵ of a person taking exception to his sister's marriage contract, which he had attested;⁶ of a principal who had recognised the settlement made by an unauthorised agent;⁷ and of beneficiaries in questions as to the validity of a purchase by a trustee,⁸ or the acceptance or rejection of provisions in their favour.⁹ Where a contract provided that a certain clause should receive effect on failure to pay an annuity, and it was alleged that there had been failure to pay, it was held that the receipt of payments at terms subsequent to the alleged failure operated as waiver of the right to enforce the clause.¹⁰ It has been observed that there are few, if any, defects in the formal procedure under a submission which may not be cured by homologation. Defects in the deed of submission, in the arbiter's omission to execute his acceptance of office, in the prorogation of the submission, in the omission of the interlocutor interponing the authority of the Court to a judicial reference in the mode of conducting a proof and finally in the award itself, have severally furnished instances in which acts of homologation have validated irregular procedure, or barred the parties personally from bringing it under challenge.¹¹

SUBSECTION (2).—*Knowledge of the Deed or Contract.*

1539. It is essential that the person from whose actings homologation is sought to be inferred should know of the existence of the deed or

¹ *Forbes v. Forbes's Tr.*, 1840, 3 D. 149.

² *M'Calman v. M'Arthur*, 1864, 2 M. 678.

³ Cf. *Falconer v. M'Leod*, 1830, 8 S. 312; *Wemyss v. Wemyss*, 1768, Mor. 9174; *Campbell v. M'Glashan*, 5th June 1812 F.C.

⁴ *Falconer v. M'Leod*, *supra*.

⁵ *Cunninghame v. Cunninghame*, 1825, 1 W. & S. 103; cf. *Pollock v. Pollock*, 1849, 12 D. 143.

⁶ *Davidson v. Davidson and Weir*, 1714, Mor. 5652; *Johnston v. Berry*, 1725, Mor. 5057; but see next para.

⁷ *Stein's Assignees v. Earl of Mar*, 1827, 6 S. 1; cf. *Smith v. City of Glasgow Bank*, 1879, 6 R. 1017.

⁸ *Fraser v. Hankey & Co.*, 1847, 9 D. 415; cf. *Thorburn v. Martin*, 1853, 15 D. 845.

⁹ *Johnstone v. Paterson*, 1825, 4 S. 234; *Selkirk v. Selkirk's Tr.*, 1854, 16 D. 715; *Keith's Tr. v. Keith*, 1857, 19 D. 1040; *Douglas v. Douglas's Trs.*, 1859, 21 D. 1066; *Paterson v. Moncrieff*, 1866, 4 M. 706; *Donaldson v. Tainsh's Trs.*, 1886, 13 R. 967; *Inglis's Trs. v. Inglis*, 1887, 14 R. 740.

¹⁰ *Thomson v. Thomson & Co.*, 1900, 2 F. 912.

¹¹ Bell on Arbitration, p. 315; see More, Notes on Stair, pp. 67, 68; *Fleming v. Wilson & M'Lellan*, 1827, 5 S. 906; *Dundee, Perth and Aberdeen Junction Rly. Co. v. Richardson*, 1851, 13 D. 552; *Paul v. Henderson*, 1867, 5 M. 613; *Elgin Lunacy Board v. Bremner and Elder*, 1874, 1 R. 1155; *Robertson v. Boyd and Winans*, 1888, 12 R. 419.

contract, together with the state of matters as affected by it.¹ Thus, homologation is not inferred from subscription as a witness unless the circumstances of the case give rise to a presumption of knowledge.² In the opinion of Lord Justice-Clerk Hope knowledge in minority is not to be held as sufficient to instruct knowledge after the minor has attained majority.³

SUBSECTION (3).—*Acts must be Unambiguous.*

1540. It is to be observed that the approbatory acts must be so strong and express that no reasonable construction can be put on them other than that they were performed by the party from his approbation of the deed alleged to have been homologated; for no man is *in dubio* presumed to have an intention of obliging himself.⁴ Thus the principle has no application where the deed alleged to operate homologation was attributable to an influence which the granter was not in a condition to resist,⁵ or was one which he was under legal obligation to grant.⁶ Further, “a protest against the inference which might otherwise collaterally arise from the act to be done will exclude homologation.”⁷

SECTION 5.—EFFECT OF HOMOLOGATION.

1541. Homologation has a retroactive effect, making the deed to which it applies good *ab initio*.⁸ It “cuts off the person homologating from all objections otherwise competent to him against the original deed; and consequently,” gives “the same effect against him and his heirs as if it had been valid from the beginning. But in relation to third parties, who are not bound to acknowledge the deeds of him who homologated, homologation can have no effect.”⁹ “Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding, and the binding effect has in this case no retrospect.”⁸

¹ Ersk. iii. 3, 48; Bell, Com. i. 145; *Johnstone v. Paterson*, 1825, 4 S. 234; *Murray v. Murray's Trs.*, 1826, 4 S. 374; *Lindsay's Curator v. City of Glasgow Bank*, 1879, 6 R. 671; *Roberts v. Do.*, 1879, 6 R. 805; *Gillespie v. Do.*, 1879, 6 R. 813; *Lord Advocate v. Wemyss*, 1899, 2 F. (H.L.) 1; *Danish Dairy Co. v. Gillespie*, 1922 S.C. 656, and cases in note 9, *supra*.

² Ersk., *loc. cit.*; see *Davidson v. Davidson and Weir*, 1714, Mor. 5652; *Johnston v. Berry*, 1725, Mor. 5657.

³ *M'Gibbon v. M'Gibbon*, 1852, 14 D. 605.

⁴ Ersk. iii. 3, 48; cf. Bell, Com. i. 145; *Westville Shipping Co. v. Abram S.S. Co.*, 1923 S.C. (H.L.), 68.

⁵ *Dallas v. Paul*, 1704, Mor. 5677.

⁶ *Dunbar*, 1662, Mor. 6715; cf. *Innes v. Mordaunt*, 1822, 1 Sh. App. 169.

⁷ Bell, Com. i. 146; *Malcolm v. Bardner*, 1823, 2 S. 410; *Crichton v. Crichton's Trs.*, 1826, 4 S. 553; 1828, 3 W. & S. 329; *Adam v. Wylie*, 1842, 5 D. 391.

⁸ Bell, Com. i. 145.

⁹ Ersk. iii. 3, 49; see *Liddel v. Dick's Crs.*, 1744, Mor. 5721 Elchie's “Homologation”; Bell, Com. i. 146 n.

HORNING, LETTERS OF.

See CHARGE; DILIGENCE OF CREDITORS;
IMPRISONMENT FOR DEBT.

HORSE BREEDING.

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SECTION 1.—INTRODUCTION.

1542. Prior to 1918 there existed in Scotland a voluntary scheme for the registration of Stallions, but statutory restrictions on breeding were imposed for the first time by the Horse Breeding Act, 1918.¹ The Act is administered in Scotland by the Board of Agriculture for Scotland,² which has power to make rules.³ The rules at present in force are the Horse Breeding (Scotland) Regulations, 1921.⁴

SECTION 2.—RESTRICTION ON TRAVELLING OR EXHIBITING STALLIONS.

1543. The Act ⁵ prohibits an owner from travelling a stallion of the prescribed age for service or exhibiting it on premises other than his own with a view to its use for service unless the stallion is licensed. It is also an offence to permit it to be so travelled or exhibited. The prohibition came into effect on 1st January 1920.⁶ The prescribed age is two years,⁶ and a stallion is deemed to have attained the age of one year on 1st January in the first year after that in which it was foaled.⁷ The owner means the person to whom for the time being the stallion belongs, either absolutely or as lessee.⁸ The penalty for an offence is a fine not exceeding £20.⁵ The licence must be produced at the time of or before service if required by the owner of the mare, and at any time if required by an officer of the Board or a police officer or any person authorised in writing by the Board. The penalty for failure to produce the licence is a fine not exceeding £5.⁹

1544. Any person authorised in writing by the Board has power to inspect any stallion which is or which he has reason to believe has been travelled or exhibited, and has power to enter premises where he has reason to believe any stallion is kept. Any person who impedes him in

¹ 8 & 9 Geo. V. c. 13.

² Sec. 13.

³ Sec. 9.

⁴ S.R. & O., 1921, No. $\frac{1576}{S. 81}$.

⁵ Sec. 1.

⁶ Regulations, Art. 3.

⁷ Regulations, Art. 2 (4).

⁸ Sec. 12.

⁹ Sec. 3 (3); Regulations, Art. 11.

the exercise of these powers is liable to a fine not exceeding £20.¹ In any prosecution the burden is on the accused of proving that a licence was in force for the stallion in question at the time it was travelled.²

SECTION 3.—GRANTING OF LICENCES.

1545. The Board has power to grant, revoke and suspend licences.³ Application for a licence must be made between 1st November and 31st July following on the form prescribed by the Regulations,⁴ and reasonable facilities must be provided for inspection and examination of the stallion.⁵ The Board must then grant the licence unless it appears to the Board that the stallion is affected with any contagious or infectious disease, or with any other prescribed disease, or has proved to be inadequately prolific, or is calculated, if used for stud purposes, to injure the breed of horses by reason of its defective conformation or physique.⁶ The prescribed diseases are cataract, roaring, whistling, ringbone (high or low), side bone, bone spavin, navicular disease, shivering, stringhalt and defective genital organs.⁷ The fee payable for the licence, together with a certified copy, if requested, is one guinea.⁸

1546. If the Board refuse to grant a licence or revoke or suspend a licence the owner is entitled to have the stallion inspected by a member or members of the panel of referees constituted under the Act,⁹ who report to the Board. On consideration of the report the Board may confirm or vary the decision.¹⁰ The application for an inspection by referees must be made within twenty-eight days of the refusal, revocation, or suspension of the licence in the form provided, and the fee payable is five guineas.¹¹

SECTION 4.—DUTIES OF LICENCE HOLDERS.

1547. The owner of a licensed stallion must give notice to the Board in writing¹² of any sale or letting or other change in the ownership of the stallion or of its castration or death. He must also submit the stallion to inspection when required by the Board, and must return the licence and certified copy (if any) on the expiration, revocation, or suspension of the licence. The penalty for failure in any of these duties is a fine not exceeding £5.¹³

SECTION 5.—RENEWAL AND TRANSFER OF LICENCES.

1548. A licence, unless suspended or revoked, remains in force until 31st October following the date of its grant, and it is renewable annually under the same conditions as apply to the grant of a licence.¹⁴ In the

¹ Sec. 6.

⁴ Art. 4.

⁷ Regulations, Art. 8.

¹⁰ Sec. 4 (1).

¹³ Sec. 5.

² Sec. 8.

⁵ Regulations, Art. 5.

⁸ Regulations, Art. 7.

¹¹ Regulations, Art. 12.

¹⁴ Sec. 3 (1); Regulations, Art. 9.

³ Sec. 2 (1).

⁶ Sec. 2 (2).

⁹ Sec. 4 (2).

¹² Regulations, Art. 13.

case of a stallion which has attained nine years of age,¹ and in respect of which a licence has been in force for two years, the renewal of the licence is not to be refused on the ground only of the stallion being affected in its wind.² If a licensed stallion is sold or is let for a period of over six months the licence must be transferred to the new owner.³ This is done by the Board cancelling the existing licence and issuing a new one without payment of a fee.⁴

SECTION 6.—FORGERY, ETC. OF LICENCES.

1549. If any person forges or fraudulently alters or uses or permits to be fraudulently altered or used any licence or certified copy, he is liable to imprisonment not exceeding three months, or to a fine not exceeding £20, or both.⁵

¹ *Cf.* para. 1543 as to calculation of ages.

² Sec. 3 (1); Regulations, Art. 9.

³ Sec. 3 (2).

⁴ Regulations, Art. 10.

⁵ Sec. 7.

HORSEFLESH, SALE OF

See FOOD AND DRUGS.

HORSE ROAD.

See SERVITUDES.

HORSES.

See ANIMALS.

HOSPITALS.

See PUBLIC HEALTH.

HOTELS.

See INN AND INNKEEPERS.

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HOUSING AND SLUM CLEARANCE.

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SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*The Housing (Scotland) Act, 1925.*

1550. The law relating to the housing of the working classes is entirely statutory. Since the middle of the nineteenth century many

GENERAL AUTHORITY.—Whyte and Berry, Housing and Town Planning in Scotland, 2nd ed.

Acts have been passed with the view of raising the standard of housing and of conferring larger powers on local authorities. The statute now in force is the Housing (Scotland) Act, 1925¹ (hereinafter referred to as "the Act" or "the Housing Act"), which reproduced in a consolidated form the permanent law relating to the housing of the working classes in Scotland. The temporary measures² which were passed for encouraging building to meet the shortage of housing accommodation were not included in the Act.³

1551. The provisions of the Act are grouped under five heads, viz.:—

Part I.—Provisions for securing the Repair, Maintenance, and Sanitary Conditions of Houses.

Part II.—Improvement and Reconstruction Schemes (Slum Clearance Schemes).

Part III.—Provision of Houses for the Working Classes.

Part IV.—Financial Provisions.

Part V.—General.

There are six schedules.

SUBSECTION (2).—*Authorities for Execution of Act.*

(i) *Central Authority.*

1552. The Department of Health for Scotland⁴ (hereinafter referred to as "the Department") is the central authority under the Act and exercises wide powers of supervision.

(ii) *Local Authorities.*

1553. The local authority charged with the execution of the Act is the local authority under the Public Health (Scotland) Act, 1897,⁵ and their district is the district of that local authority (s. 118).⁶ In burghs, the town councils, and in rural districts, the district committees⁷ or county councils sitting as such, are the local authorities. A local authority may appoint a committee to execute the Act, but may not authorise it to raise money by rate or loan (s. 92). The Department

¹ 15 Geo. V. c. 15. The history of housing legislation may be traced by reference to the repeal schedules of the Act, and of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), now repealed.

² As to these, see paras. 1663 *et seq.*, *infra*.

³ The powers in the Act are in addition to, and not in derogation of, any other powers conferred by Act of Parliament, law, or custom. The provisions of a local Act do not exempt a local authority from their obligations under the Act (s. 117 of Housing Act).

⁴ See the Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34), and the Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20).

⁵ 60 & 61 Vict. c. 38.

⁶ That is, of the Housing Act. All references to the sections of the Act are made in this way in the text which follows.

⁷ District committees have no power to raise money by rate or loan, or acquire land. Lands for their use are acquired and held by the county council, and any funds they require are supplied on requisition by the county council. See Local Government (Scotland) Act, 1889, ss. 17 (2), 18 (6) and (7).

may authorise local authorities to act jointly for any purposes of the Act (s. 93).

SUBSECTION (3).—“*Persons of the Working Classes.*”

1554. The Act contains no general definition of the expression “working classes.” The only definition given is in paragraph 12 (e) of the Fifth Schedule, but it is limited to the purposes of that schedule. The term was judicially considered in *White v. St. Marylebone Borough Council*,¹ where a chauffeur was held to be a member of the working class. The words must be interpreted in the ordinary and popular sense.² For definition of workman’s dwelling see paragraph 1 of the Fifth Schedule.

SUBSECTION (4).—“*Dangerous or Injurious to Health.*”

1555. The expression “so dangerous or injurious to health as to be unfit for human habitation” occurs frequently in the Act. The words “dangerous” and “injurious to health” are not alternative but cumulative, the former being exegetical of the latter.³

SECTION 2.—REPAIR, MAINTENANCE, AND SANITARY CONDITIONS
OF HOUSES (PART I. OF ACT).

SUBSECTION (1).—*Obligations as to Repair of Houses.*

(i) *Conditions Implied on Letting Houses.*

1556. Where a dwelling-house is let at a rent not exceeding £26,⁴ it is implied in the contract, notwithstanding any stipulation to the contrary, that the house is in all respects reasonably fit for human habitation at the commencement of the tenancy, and that it will be kept so by the landlord during the tenancy;⁵ but this does not apply when the house is let for not less than three years upon the terms that

¹ [1915] 3 K.B. 249.

² *Ibid.*, per Lord Reading at p. 257; see also *London County Council v. Davies*, 1898, 62 J.P. 68.

³ *Kirkpatrick v. Maxwelltown Town Council*, 1912 S.C. 288; see also *Hall v. Manchester Corporation*, 1915, 79 J.P. 385.

⁴ As to houses let at more than £16, see s. 1 (4).

⁵ This obligation is a warranty. See *Walker v. Hobbs*, 1889, 23 Q.B.D. 458; *Middleton v. Hall*, 1913, 108 L.T. 804; *Ryall v. Kidwell & Son*, [1914] 3 K.B. 135; *Weston v. Mories*, 1923, 39 Sh. Ct. Rep. 86; *M'Glory v. Playfair*, 1925, 41 Sh. Ct. Rep. 223; *Fisher v. Walters*, [1926], 2 K.B. 315; but see *Morgan v. Liverpool Corporation* [1927] 2 K.B. 131, where it was held that notice to the landlord is necessary before he can be found liable for defects. As to landlord's obligation at common law, see *Wolfson v. Forrester*, 1910 S.C. 675, per Lord Dunedin at p. 680. Strangers to the contract of tenancy have no remedy for breach of statutory implied undertaking, e.g. tenant's wife (*Middleton v. Hall*, *supra*) or infant daughter (*Ryall v. Kidwell & Son*, *supra*); or at common law (*Cavalier v. Pope*, [1906] A.C. 428; *Cameron v. Young*, 1908 S.C. (H.L.) 7). The Act does not impose an obligation on a landlord to keep a common stair in repair (*Dunster v. Hollis*, [1918] 2 K.B. 795). For cases where non-habitability was pled in defence to an action for rent, see *Bell v. Gorman*, 1924, 40 S.C.R. 10; *M'Glory v. Playfair*, *supra*; cf. s. 25 of Act.

the lessee will put it into that condition, and the lease is not determinable before the expiration of three years (s. 1 (1)). Contracting out is expressly prohibited. The landlord may enter the premises to view their condition (s. 1 (2)). The above implied conditions also apply to houses occupied by agricultural workers where the houses form part of their remuneration (s. 2).

(ii) *Powers of Local Authorities to Repair Houses.*

1557. If the owner¹ of any house² suitable for occupation by the working classes fails to make or keep the house reasonably fit for human habitation, the local authority may serve a notice³ upon him requiring him within a reasonable time, not being less than twenty-one days,⁴ to execute the work specified in the notice (s. 3 (1)). The local authority may also serve copies of the notice on any persons having a right or interest in the premises superior to that of the owner (s. 3 (6)).

1558. If the house is not capable, without reconstruction, of being made fit for human habitation, the owner may, within twenty-one days, by counter-notice⁵ to the local authority, declare his intention of closing it for human habitation, and a closing order⁶ is then deemed to have become operative⁷ in respect of the house, any difference between the owner and the local authority being determined by the Sheriff (s. 3 (1)). The local authority may, on obtaining authority from the Department, proceed to acquire the house as if it were land authorised to be acquired compulsorily for the purposes of a reconstruction scheme under Part II. (s. 4) of the Act.⁸

1559. If the notice of the local authority is not complied with, they may themselves do the work (s. 3 (2)) and recover the expenses from the owner in a summary manner (s. 3 (3) (a)); or they may, by order,⁹ declare the expenses to be payable by monthly or annual instalments

¹ By s. 3 (5) owner has the same meaning in this section as in the Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38) s. 3. Cf. *Watts v. Battersea Corporation*, [1928] W.N. 290; 45 T.L.R. 85, where under the corresponding section of the English Housing Act, 1925 (15 Geo. V. c. 14), a solicitor receiving rents of a property towards costs due to him was held to be the owner and liable to pay for repairs carried out by the local authority. Cf. definition of "owner" in s. 4 of the Public Health Act, 1875.

² The section applies to a house whether let or not let, and the rental limitations in s. 1 do not affect it (*Arlidge v. Tottenham Urban Council*, [1922] 2 K.B. 719; see also *M'Kinn's Curator v. Local Authority of Carrick District of County of Ayr*, 1922, Sh. Ct. Rep. 194 (cot houses on a farm held to fall under section)).

³ Form No. 1 (Housing (Form of Orders, Notices, etc.) Order (Scotland), 1925). As to specification of works required, see *M'Kinn's Curator, supra*.

⁴ The notice must give the owner a reasonable time to execute the work; the minimum period of twenty-one days may not be reasonable (*Ryall v. Cubitt Heath*, [1922] 1 K.B. 275).

⁵ Form No. 2 (Housing Order), *supra*.

⁶ See paras. 1562 to 1565, *infra*.

⁷ See para. 1567, *infra*.

⁸ See *infra*, paras. 1586 *et seq.* The compensation to be paid will fall to be assessed on the basis of site value only; see *infra*, para. 1604.

⁹ Form No. 3 (Housing Order), *supra*.

within a period not exceeding thirty years with interest, and recover same from the owner or occupier, and if from the latter, he may deduct them from his rent ¹ (s. 3 (3) (b)).

1560. An owner may appeal to the Sheriff against (a) any notice requiring him to execute works, or (b) any demand for the recovery of the expenses, or (c) an order made by the local authority with respect to those expenses (s. 3 (4) and (5)). No appeal lies in cases (b) and (c) if and so far as it raises any questions which might have been raised on an appeal against the notice itself.²

SUBSECTION (2).—*Inspection of District and Houses, etc.*

1561. It is the duty of every local authority to cause an inspection of their district to be made from time to time to ascertain whether any dwelling-house therein is unfit for human habitation (s. 5). The Medical Officer of Health has also a duty to represent to the local authority any dwelling-house which appears to him to be in such a state (s. 6). Any four or more local government electors or a parish council or landward committee may complain in writing to the Medical Officer as to the condition of dwelling-houses (s. 7).

SUBSECTION (3).—*Closing Orders.*

(i) *Houses Unfit for Human Habitation to be Closed.*

1562. If a local authority receives a representation ³ from any of its officers, or from other sources, that a dwelling-house is in a state so dangerous or injurious to health as to be unfit for human habitation, they must make a closing order ⁴ prohibiting the use of the house for human habitation until it is rendered fit for that purpose ⁵ (s. 8 (1)).

(ii) *Notice to Owner.*

1563. Notice ⁶ of the closing order must be served forthwith on the

¹ The remedies under s. 3 (a) and s. 3 (b) are not mutually exclusive, but cumulative. Accordingly a local authority who have made an order for payment of the full sum under (a) and failed to obtain payment, may subsequently make an order for payment by instalments under (b) (*Salford Corporation v. Hale*, [1925] 1 K.B. 503 (C.A.)).

² But see *Ryall v. Cubitt Heath*, [1922] 1 K.B. 275; *Rex v. Minister of Health, ex parte Rush*, [1922] 2 K.B. 28; *Ryall v. Hart*, [1923] 2 K.B. 464; *Adams v. Tuer*, 1923, 40 T.L.R. 49. As to appeals generally, see para. 1652, *infra*.

³ See s. 114 (1).

⁴ Form No. 4 (Housing Order), *supra*. Non-occupancy is not an objection to the making of a closing order. See *Robertson v. King*, [1901] 2 K.B. 265.

⁵ The local authority may competently issue a closing order without previously exercising their powers under s. 3 of the Act to require the owner to execute remedial works, but as to the advisability of informing the owner of the defects in the house before the closing order is made, see *Kirkpatrick v. Maxwelltown Town Council*, 1912 S.C. 288.

⁶ Form No. 5 (Housing Order), *supra*. The prescribed forms should be strictly followed. See *Rayner v. Stepney Corporation*, [1911] 2 Ch. 312, where omission of part of form rendered proceedings of local authority invalid.

owner ¹ of the house, who may appeal to the Sheriff ² within fourteen days after the notice is served on him ³ (s. 8 (2)).

(iii) *Notice to Occupier.*

1564. Where a closing order has become operative,⁴ the local authority must serve notice ⁵ of it on the person inhabiting the house, and, within the period specified in the notice, not being less than fourteen days, he and his family must leave the house. In default he may be ordered by the Sheriff or other judge to remove ⁶ (s. 8 (3)). Provision is made by s. 8 (4) for payment in certain circumstances of the tenant's expenses in removing.

(iv) *Determination of Order.*

1565. The local authority must determine the closing order if they are satisfied that the house has been rendered fit for human habitation ⁷ (s. 8 (5)). If they refuse to do so, the owner may appeal to the Sheriff ⁸ (s. 8 (6)).

SUBSECTION (4).—*Penalty on Letting "Closed House."*

1566. If (a) the owner of any house closed by a closing order or other person lets it, or occupies or permits it to be occupied as a dwelling-house; or if (b) the owner lets or uses it for any purpose without the consent of the local authority, he is liable to a penalty not exceeding £20, and to further penalties if he continues the offence (s. 9).

SUBSECTION (5).—*Demolition Orders.*

(i) *Notice to Owner of Proposed Order.*

1567. Where a closing order has remained operative for a period of three months, the local authority must consider the question of the demolition of the house, and must give the owner at least a month's

¹ See *United Collieries, Ltd. v. Midlothian County Council*, 1912, 28 Sh. Ct. Rep. 329; *Agnew v. Middle Ward of Lanarkshire*, 1913, 29 Sh. Ct. Rep. 275; cf. *Arlidge v. Hampstead Metropolitan Borough*, [1916] 1 Ch. 59.

² As to Sheriff's discretion to state a special case for the opinion of the Court of Session on a question of law, see proviso to s. 103 (2), and para. 1652, *infra*.

³ For circumstances in which appeal refused, and as to Sheriff's power to award expenses, see *Steele v. Middle Ward of Lanarkshire*, 1928, 44 Sh. Ct. Rep. 249. As to care to be exercised in framing closing orders against blocks or tenements of houses, see *Kirkpatrick v. Maxwelltown Town Council*, 1912 S.C. 288; *United Collieries v. Midlothian County Council*, *supra*; *M'Diarmid v. Glasgow Housing Committee*, 1917 S.C. 361; *Bell v. Gourrock Corporation*, 1924, 40 Sh. Ct. Rep. 296; cf. *Giuliani v. Smith*, 1924 S.C. 247; 1925 S.C. (H.L.) 45.

⁴ See s. 103 (3).

⁵ Form No. 6 (Housing (Form of Orders, Notices, etc.) Order (Scotland), 1925).

⁶ The owner has no title to sue an action of removing, the relationship of landlord and tenant having ceased when the closing order became operative (*Scott's Timber Co., Ltd. v. O'Neil*, 1926, S.L.T. (Sh. Ct.) 68); see also *Blake v. Smith*, [1921] 2 K.B. 685 (tenant not entitled to retake possession after the house has been repaired).

⁷ Form No. 7 (Housing Order), *supra*.

⁸ Notice of refusal, Form No. 8 (Housing Order), *supra*. As to appeals, see para. 1652, *infra*.

notice ¹ of the time and place at which the question will be considered (s. 10 (1)).

(ii) *Order for Demolition.*

1568. If after hearing the owner the local authority are of opinion that steps have not been or are not being taken to render the house fit for human habitation, or that the continuance of the house or any building which is part of it is a nuisance or dangerous or injurious to the health of the public or of the inhabitants of the neighbouring houses, they must order ² the demolition of the house or building (s. 10 (2)).³ If the owner undertakes forthwith to make the house fit for human habitation, and the local authority consider that practicable, they may postpone the operation of the order for not longer than six months (s. 10 (3)).⁴

(iii) *Notice of Order to Owner.*

1569. Notice ⁵ of the demolition order must be forthwith served on the owner, who may appeal ⁶ to the Sheriff within twenty-one days after the notice is served upon him, or, where the operation of the order has been postponed for any period, within fourteen days after the expiration of that period (s. 10 (4)).

SUBSECTION (6).—*Execution of Demolition Order.*

1570. The owner of a building in respect of which a demolition order has been made must, within three months after the order becomes operative, take down and remove the building, and if he fails to do so, the local authority are directed to take it down, sell the materials, and, after deducting expenses, pay over the balance of money (if any) to the owner (s. 11 (1)), or, if there is a deficiency, they may recover it from him (s. 11 (2)). No house or other building or erection which will be dangerous or injurious to health may be erected on the site of the demolished building (s. 11 (3)).

SUBSECTION (7).—*Underground Rooms.*

1571. A room habitually used as a sleeping-place, the floor of which is more than three feet below the surface of the street, is deemed to be unfit for human habitation if it is of the description specified (s. 12 (1)). Although closed, it may be used for purposes other than sleeping ⁷ (s. 12 (2)), and is not liable to demolition ⁸ (s. 12 (3)).

¹ Form No. 9 (Housing Order), *supra*.

² Form No. 10 or 12 (Housing Order), *supra*.

³ The local authority have no discretion, but must make the order (*Lancaster v. Burnley Corporation*, [1915] 1 K.B. 259).

⁴ Form No. 14 (Housing Order), *supra*. The local authority must exercise their discretion judicially and afford the owner an opportunity of adequately presenting his case (*Broadbent v. Rotherham Corporation*, [1917] 2 Ch. 31; 1918, 87 L.J. Ch. 308).

⁵ Form No. 11 or 13 (Housing Order), *supra*.

⁶ As to appeals, see para. 1652, *infra*.

⁷ See para. 1566, *supra*.

⁸ See para. 1567, *supra*.

SUBSECTION (8).—*Back-to-back Houses.*

1572. Back-to-back houses intended for the working classes may not be erected, and any such houses are deemed to be unfit for human habitation,¹ but a house containing several dwellings placed back to back may be erected or used if the Medical Officer of Health certifies that effective ventilation has been provided for (s. 13).²

SUBSECTION (9).—*Obstructive Buildings.*(i) *May be pulled down.*

1573. If a Medical Officer of Health finds that any building³ is so situated that its proximity to other buildings (a) stops or impedes ventilation or otherwise makes such other buildings unfit for human habitation, or (b) prevents the remedy of any nuisance injurious to health in respect of such other buildings, he must represent to the local authority the particulars relating to the obstructive building, and recommend that it should be pulled down. Any four or more local government electors or the parish council or landward committee may make a like representation. On receiving the representation, the local authority must obtain a report on the building, the cost of pulling it down, etc. After hearing the owner, the local authority must either allow any objections stated by him, or order the building to be pulled down⁴ (s. 14).

(ii) *Compensation for pulling down Obstructive Building.*

1574. Where such an order is made, and either no appeal is made against it or an appeal is made and fails, the local authority may purchase the land on which the obstructive building is erected, and for the purpose of such purchase the provisions of the Lands Clauses Acts⁵ with respect to the taking of lands otherwise than by agreement apply. The owner may, within one month after notice to purchase is served on him, elect to retain the site and undertake to pull down the building, and, if so, he is entitled to compensation for the pulling down (s. 15 (3)).⁶

¹ See para. 1562, *supra*.

² See *Murrayfield Real Estate Co., Ltd. v. Edinburgh Magistrates*, 1912 S.C. 217; *White v. St. Marylebone Borough Council*, [1915] 3 K.B. 249.

³ This is not confined to dwelling-houses. See *Jackson v. Knutsford Urban District Council*, [1914] 2 Ch. 686 (cycle makers' workshop held to be a "building").

⁴ The owner has the same right of appeal as against a demolition order; see para. 1569, *supra*.

⁵ The Lands Clauses Acts mean, as regards Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), and the Lands Clauses Consolidation Acts (Amendment Act), 1860 (23 & 24 Vict. c. 106), but the modifications made thereon by the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. V. c. 57), must be kept in view. See also para. 1576, *infra*, and COMPULSORY PURCHASE, Vol. IV. para. 737, *ante*.

⁶ Cf. *Thomson v. Annan District Committee*, 1894, 2 S.L.T. 14; *Lanarkshire (Middle Ward) District Committee v. Marshall*, 1896, 24 R. 139 (case under Public Health Act).

The compensation payable under this section is, in case of difference, settled by arbitration (s. 15 (4)).¹ The conditions under which part only of a building may be taken are dealt with in s. 15 (5).²

(iii) *Use of Site after Obstructive Building Demolished.*

1575. Where the owner retains the site, no building which will be dangerous or injurious to health, or obstructive, may be erected on it (s. 17 (1)). Where the local authority purchase the site, they must pull down the building or such part as may be obstructive, and keep the whole or part of the site as an open space,³ or they may dedicate the land as a highway or other public place (s. 17 (2) and (3)).

SUBSECTION (10).—*Assessment of Compensation.*

1576. Compensation under Part I. of the Act is assessed under the Acquisition of Land (Assessment of Compensation) Act, 1919,⁴ as modified by the rules in Parts II. and III. of the First Schedule to the Housing Act (s. 16 (1)).⁵ On payment of the compensation, the owner must grant a conveyance to the local authority, and provision is made where he fails to do so (s. 16 (2)).

SUBSECTION (11).—*Water-closets in Rural Districts.*

1577. Without prejudice to the provisions of the Public Health (Scotland) Act, 1897,⁶ the local authority of a district other than a burgh may require the owner of an occupied dwelling-house to provide a water-closet if that is practicable, if not, an earth-closet, the Sheriff determining any question as to what is practicable (s. 20).

SUBSECTION (12).—*Charging Orders.*

1578. Where a local authority have required an owner to execute works on his house and he has executed them to their satisfaction, they may make a charging order providing that the house is burdened with an annuity at the rate fixed by the Act, to repay the cost (s. 21).⁷

¹ See para. 1576, *infra*. As to the operation of the principle of "betterment," see s. 15 (6) of Housing Act.

² See *Beyfus v. Westminster Corporation*, 1914, 79 J.P. 111; cf. *Genders v. London County Council*, [1915] 1 Ch. 1.

³ For definition, see s. 86 (4).

⁴ 9 & 10 Geo. V. c. 57.

⁵ Part II. applies to the purchase of lands on which obstructive buildings are erected, and Part III. where the buildings are pulled down, the owner retaining the site.

⁶ 60 & 61 Vict. c. 38.

⁷ The order is recorded in the appropriate Register of Sasines, and has priority over all existing and future interests and incumbrances, with the exceptions specified (s. 22 (1) and (2)). It may be transferred like a bond and disposition in security or rent charge (subs. (5)). The owner may redeem the annuity on terms agreed upon, or, failing agreement, as fixed by the Department (subs. (6)).

SUBSECTION (13).—*Superiors' Rights.*

1579. A superior of lands may give notice of his right of superiority to the local authority, and thereupon they must give him notice of any proceedings taken by them under Part I. If the superior's interests are prejudiced by default in executing works¹ ordered by the local authority, he may apply to the Sheriff for an order empowering him to enter on the lands and do what the owner has failed to do (s. 23).

SUBSECTION (14).—*Houses Divided into Separate Dwellings.*

1580. Under s. 72 of the Public Health (Scotland) Act, 1897, a local authority may make by-laws for fixing the number of persons who may occupy houses which are let in lodgings or occupied by members of more than one family,² for cleansing such houses, enforcing water-closet accommodation therein, etc. By s. 24 (1) of the Housing Act this power is, in the case of houses for the working classes, extended to the making of by-laws imposing any duty which involves the execution of work upon the owner,³ in addition to or in substitution for any other person having an interest in the premises.

SUBSECTION (15).—*Saving for Owners' Remedies against Tenant.*

1581. Nothing in Part I. prejudices the remedies of an owner for breach of contract, etc., by the tenant of a dwelling-house in respect of which an Order has been made by a local authority. If the owner is obliged to take possession of the house in order to comply with the Order, he does not lose his right to avail himself of any breach that may have occurred prior to his taking possession (s. 25).⁴

SUBSECTION (16).—*Enforcement of Local Authority's Duties under Part I.*

1582. On a complaint by the county council, parish council, or landward committee, or four or more local government electors, that the local authority have failed to exercise their powers, the Department may cause a public local inquiry to be held (s. 18 (1)). If they are satisfied that the local authority have neglected their duties, they may petition the Court of Session (s. 18 (2) and (3)).⁵

¹ See ss. 8, 10, and 15 (3).

² *Kyffin v. Simmons*, [1903] K.B. 67; J.P. 227; cf. *Weatheritt v. Cantlay*, [1901] 2 K.B. 285.

³ As defined in Public Health (Scotland) Act, 1897, s. 3. For owner's right to enter premises to discharge any duty imposed under by-laws, see s. 24 (2) of Housing Act; cf. *Arlidge v. Islington Corporation*, [1909] 2 K.B. 127.

⁴ But see *Scott's Timber Co., Ltd. v. O'Neil*, 1926, S.L.T. (Sh. Ct.) 68; cf. s. 3 (7) of Act saving tenant's remedies against the landlord at common law or otherwise.

⁵ See also s. 19.

SECTION 3.—SLUM CLEARANCE SCHEMES¹ (PART II. OF ACT).SUBSECTION (1).—*Improvement Scheme or Reconstruction Scheme?*

1583. The Act empowers local authorities to make schemes for the clearance of slum areas. Such schemes, although known popularly as “slum clearance schemes,” are described in the Act as either improvement schemes or reconstruction schemes. The procedure is the same except for one or two differences in the initiation of the schemes. The chief practical difference is that while any number of unhealthy areas may be included in one improvement scheme (s. 26 (2)), only one unhealthy area may be included in a reconstruction scheme. The latter, therefore, should be adopted where the local authority propose to deal with only one area which is too small to be dealt with under an improvement scheme (s. 28 (b)).²

SUBSECTION (2).—*Who may make Improvement and Reconstruction Schemes?*

1584. An improvement scheme may be made by the local authority³ of a burgh. The local authority³ of a district other than a burgh must obtain an order from the Department before they can make such a scheme (s. 26 (3)). The provisions of the Act relating to reconstruction schemes are, however, applicable to county as well as to burghal areas.

SUBSECTION (3).—*When Improvement Scheme must be made.*

1585. The initiation of an improvement scheme rests with the Medical Officer of Health. If he is of opinion that there is an unhealthy area within his district, he lodges with the local authority what is known as an official representation.⁴ This must state why the area is unhealthy, e.g. houses unfit for human habitation, congested state of area endangering health, etc., and that the most satisfactory method of dealing with the evils complained of is an improvement scheme for rearranging and reconstructing all or some of the streets and houses within the area. The local authority must consider the representation, and if satisfied of its truth, and of the sufficiency of their financial resources, they must resolve to make an improvement scheme forthwith (s. 26 (1)).

¹ For details of procedure, see articles by the writer of this title on “Slum Clearance Schemes” in S.L.T. (News Section), 1926, p. 4, and 1927, p. 171.

² For particulars of financial assistance available to local authorities, see para. 1664, *infra*.

³ See para. 1553, *supra*.

⁴ See s. 114. A medical officer must make such a representation whenever he sees cause to make it. If he receives a complaint from two justices of the peace or from four or more local government electors, he must inspect the area complained of and report on it (s. 27 (2)).

SUBSECTION (4).—*When Reconstruction Scheme must be made.*

1586. A reconstruction scheme must be made (a) where an order for the demolition ¹ of a building has been made, and it appears to the local authority that it would be beneficial to the health of the inhabitants of the neighbouring houses if the area of which such building forms part were used as a highway or open space,² or utilised for the erection of houses for the working classes,³ or exchanged for neighbouring land more suitable for the erection of such houses; or (b) where it appears to the local authority that the congestion or bad condition of any buildings, or the want of light, air, ventilation, etc., is dangerous or prejudicial to the health ⁴ of the inhabitants of these or neighbouring buildings, and that the most satisfactory method of dealing with the evils is by the demolition or reconstruction of the buildings (s. 28).⁵ Unlike the case of an improvement scheme, an official representation ⁶ is not required before a local authority can proceed with this type of scheme. After they have passed a resolution directing a reconstruction scheme to be prepared, the subsequent procedure is the same as in the case of an improvement scheme.

SUBSECTION (5).—*Procedure in Connection with Improvement and Reconstruction Schemes.*(i) *Contents of Scheme.*

1587. The scheme may exclude any part of the area in respect of which the resolution was passed, or include any neighbouring lands if the former is expedient or the latter necessary to make the scheme efficient; it may provide for widening existing approaches to the unhealthy area, and for closing and diverting highways, and it must distinguish the lands proposed to be taken compulsorily (s. 29).

(ii) *Accommodation for Dispossessed Tenants.*

1588. Where persons of the working classes ³ are displaced by the scheme, the local authority must, if the Department so require, provide for their accommodation (s. 29 (4)), and the local authority may, for that purpose, appropriate any lands belonging to them, or purchase further lands by agreement (s. 29 (5)).

(iii) *Maps.*

1589. Several maps prepared in accordance with the Department's instructions ⁷ require to be lodged. Properties scheduled as insanitary

¹ See paras. 1568 and 1573, *supra*.

² For definition, see s. 86 (4).

³ See para. 1554, *supra*.

⁴ See para. 1555, *supra*.

⁵ A reconstruction scheme is not limited to the acquisition and reconstruction of insanitary properties. The buildings acquired may be demolished and the site sold for the erection of houses for the working classes, or used as an open space or for other purposes.

⁶ Cf. para. 1585, *supra*.

⁷ See Memorandum and List of Instructions issued by the Department.

are coloured red, while those included in the scheme only for the purpose of making it efficient, and not on account of their sanitary condition, are coloured blue.

(iv) *Advertisement and Notices.*

1590. After the form of the scheme has been finally settled, it is approved of by the local authority, and signed and sealed. The next steps are (a) to publish in a newspaper circulating in the district an advertisement¹ stating that the scheme has been made and where it may be seen (s. 30 (a)); and (b) to serve a notice on every owner,² lessee,² and occupier³ (except tenants for a month or a period less than a month) stating that the local authority propose to take compulsorily the lands in which they are interested. In the case of owners and lessees the notices require an answer stating whether they dissent or not in respect of the taking of their lands (s. 30 (b)).⁴

(v) *Petition to Department.*

1591. After publication of the advertisement and the expiry of the *induciae* allowed under the notices, the local authority present a petition to the Department for an Order confirming the scheme (s. 31 (1)). The petition refers to the representation made by the Medical Officer, the resolution passed by the local authority, the publication of the advertisement and the service of the notices, and a list is annexed of the owners and lessees who have intimated their dissent in respect of the taking of their lands (s. 31 (2)). Several documents must be lodged with the petition, including an estimate of the cost of carrying the scheme into effect.⁵

(vi) *Local Inquiry.*

1592. The Department, after considering the petition, appoint a commissioner to hold a local inquiry (ss. 31 (3) and 96), and usually associate with him a medical and an architectural assessor.⁶ After the local authority have led evidence in support of the scheme, the dissenting owners are entitled to lead evidence as to the condition of their properties.

(vii) *Confirmation Order.*

1593. If the Department are satisfied on the report of the commissioner that the circumstances justify the making of the scheme,

¹ Form No. 16 (Housing (Forms of Orders, Notices, etc.) Order (Scotland), 1925).

² *Ibid.*, Form No. 17.

³ *Ibid.*, Form No. 18.

⁴ One insertion of the advertisement would appear to be sufficient to comply with the Act, but fuller intimation is advisable. No provision is made for the length of time within which owners or lessees may state whether they dissent or not. A reasonable time should be given.

⁵ For full list of documents, see Department's Memorandum and List of Instructions.

⁶ The local authority are generally required by the Department (although this is not prescribed in the Act) to give intimation of the inquiry by advertisement, and also by notice to the dissenting owners and lessees.

and that the carrying into effect of it, either absolutely or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area or of the neighbouring dwelling-houses, they may by Order confirm the scheme (s. 31 (3)). The Order may incorporate the provisions of the Lands Clauses Acts,¹ and, for the purpose of those provisions, the Housing Act is deemed to be the special Act and the local authority the promoters of the undertaking. The land comprised in the area must be acquired within three years after the date of the Order² (s. 31 (4)).

(viii) *Finality of Department's Order.*

1594. Formerly the Order of the Department had to be confirmed by Act of Parliament. Now it has full statutory effect without such confirmation (s. 31 (5)).

(ix) *Expenses Incurred by Dissenters and Department.*

1595. The Department may allow any person whose lands are proposed to be taken compulsorily, reasonable costs incurred in opposing the scheme. These costs and all costs incurred by the Department in connection with the Order are payable by the local authority (s. 32).

(x) *Notice of Order.*

1596. After the Order has been made, the local authority must serve notices³ upon the persons upon whom notices in respect of lands proposed to be taken compulsorily require to be served⁴ (s. 31 (6)).

(xi) *Notice to Treat.*

1597. The local authority must also take steps to purchase the land required, and carry the scheme into execution as soon as practicable⁵ (s. 33 (1)). Notices to treat will be served on all parties interested in lands which are to be acquired by compulsory powers. As to the local authority's power to withdraw such notices, see s. 5 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919.⁶

¹ See note 5, p. 640, *supra*, and the Second Schedule to the Housing Act, for certain provisions subject to which the Lands Clauses Acts are incorporated in the Order. See also paras. 1603 *et seq.*, *infra*.

² The Order sets forth the uses to which the lands are to be put, *e.g.* reconstruction of existing buildings for the accommodation of the working classes, resale or disposal for purposes other than dwelling accommodation for the working classes, open spaces, etc.

³ For owners and lessees Form No. 19, and for occupiers Form No. 20 (Housing (Forms of Orders, Notices, etc.) Order (Scotland), 1925). These notices intimate that the Department have made an Order confirming the scheme whereby, *inter alia*, powers are conferred on the local authority to take compulsorily lands in which the recipient of the notice is believed to be interested.

⁴ See para. 1590, *supra*.

⁵ The local authority are not bound to acquire any leasehold interest which can be allowed to expire without unduly delaying the execution of the scheme. As to obtaining possession of houses subject to the Rent Restrictions Act, see para. 1661, *infra*.

⁶ 9 & 10 Geo. V. c. 57.

(xii) *Notice of Entry.*¹

1598. Under the Lands Clauses Consolidation (Scotland) Act, 1845² (ss. 83 to 88), the promoters of an undertaking are not entitled, except by consent of the owners and occupiers, to enter upon the lands to be purchased compulsorily until they have either paid, or deposited in bank, the compensation agreed or awarded to be paid, unless for the purpose of surveying, taking levels, etc. By virtue, however, of s. 89 of the Housing Act, a local authority may, at any time after notice to treat has been served, and on giving not less than twenty-eight days' notice to the owner and occupier of the land to be taken compulsorily, enter on and take possession of the land, or part thereof, without previous consent of the owners and occupiers or compliance with the above provisions of the Lands Clauses Act, but subject to payment of the like compensation as would have been payable if those provisions had been complied with.

(xiii) *Period allowed for Completion of Scheme.*

1599. The Department, as a rule, make it a condition in their Order that the scheme must be completed within a specified period unless otherwise consented to by them in writing. The period allowed varies, but in this connection it should be noted that the land proposed to be acquired compulsorily must be acquired within three years after the date of the Department's Order (s. 31 (4)).

(xiv) *Modification of Scheme.*

1600. The Department may, on their being satisfied that an improvement can be made in the details of any scheme confirmed by them, permit the local authority to modify it, either by the abandonment of any part which it is inexpedient to carry into execution, or by amending or adding to it in matters of detail (s. 35).

SUBSECTION (6).—*Execution of Schemes.*

1601. When an Order confirming any improvement or reconstruction scheme has been made, the local authority must carry the scheme into execution as soon as practicable (s. 33 (1)).³ They may not themselves, without the Department's consent, rebuild any premises or execute any part of the scheme except certain specified works, *e.g.* taking down

¹ The Department have not prescribed any form of notice of entry. For a suggested form, see article on "Slum Clearance Schemes" in S.L.T. (News Section), 1927, p. 171, at p. 173.

² 8 & 9 Vict. c. 19, ss. 83 to 88.

³ See paras. 1599 and 1600, *supra*. For the local authority's powers to have the scheme carried out by other parties, see s. 33 (2), (3), and (6). They may also insert provisions in conveyances, feu-rights, or leases of any part of the area regulating the type of buildings to be erected, and prohibiting their division or alteration without their consent (s. 33 (2) and (5)).

premises and forming streets (s. 33 (4)). They may pay to any tenant for less than a year, of a house which has not been closed by a closing Order,¹ a reasonable allowance for his expenses in removing (s. 33 (7)).²

SUBSECTION (7).—*Extinction of Rights of Way and other Servitudes.*

1602. Upon the purchase by the local authority of any lands required for an improvement or reconstruction scheme, all rights of way, rights of laying down or of continuing pipes, etc., through such lands, and all other rights or servitudes are extinguished, and the soil of such ways, and the property in the pipes, etc., vest in the local authority, subject to compensation being paid in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919³ (s. 36).

SUBSECTION (8).—*Assessment of Compensation.*

1603. The compensation for land and premises included in an improvement or reconstruction scheme only for the purpose of making it efficient, and not on account of the sanitary condition of the premises, or of these premises being dangerous or prejudicial to health,⁴ is assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919,⁵ subject to the modifications contained in Part I. of the First Schedule to the Housing Act (s. 37 (3)).

1604. In the case of other land included in an improvement or reconstruction scheme, the compensation to be paid therefor, including any premises thereon which are specified in the scheme as being in an insanitary condition or dangerous or prejudicial to health,⁶ is the value at the time when the valuation is made of the land as a site cleared of buildings and available for development in accordance with the building regulations in force in the district.⁷ If the Department are of opinion that the scheme should provide for rehousing persons of the working classes⁸ on the cleared site, or that it should be laid out as an open space,⁹ the compensation must be reduced by an amount ascertained in accordance with s. 37 (1) (a) to (d). Subject as aforesaid, the compensation

¹ See para. 1562, *supra*.

² Nothing in the Act authorises a local authority to take, or the Minister of Health to approve, an unrestricted power to sell or lease the lands compulsorily acquired as the local authority may think fit; *R. v. Minister of Health, ex parte Davis*, [1928] W.N. 31; 45 T.L.R. 176, where the Minister was prohibited from proceeding with the consideration of a scheme containing such a power.

³ 9 & 10 Geo. V. c. 57; see *Badham v. Morris*, 1882, 45 L.T. (N.S.) 579.

⁴ See para. 1563, *supra*.

⁵ 9 & 10 Geo. V. c. 57; see COMPULSORY PURCHASE, Vol. IV. para. 738, *ante*. For a consideration as to how far the provisions of an agreement between parties may affect the basis of valuation under the Acquisition of Land Act, and whether an authority can contract out of the Act, see *Thurrock, Grays, and Tilbury Joint Sewerage Board v. Thames Land Co.*, 1925, 90 J.P. 1.

⁶ See para. 1555, *supra*.

⁷ See *Northwood v. London County Council*, [1926] 2 K.B. 411 (licensed public-house on land compulsorily acquired; held that the arbiter was not entitled to award to the licensee any sum for loss of licence, etc.).

⁸ See para. 1554, *supra*.

⁹ For definition, see s. 86 (4).

for the land or premises referred to in this paragraph must be assessed in accordance with the Acquisition of Land, etc., Act, 1919.¹

1605. When arbitration is resorted to, the arbiter is normally the official arbiter appointed under the Acquisition of Land, etc., Act, 1919.¹ His decision upon any question of fact is final and binding on the parties, but he may, and must, if either Division of the Court of Session so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the Court, any question of law arising in the course of the proceedings. The decision of the Court upon any case so stated is final and not subject to appeal.²

SUBSECTION (9).—*Power to Acquire Lands in Advance.*

1606. Where a local authority have passed a resolution that an improvement³ or reconstruction scheme⁴ should be made, they may, with consent of the Department, acquire by agreement any lands included in the scheme, although it may not have been made by the local authority or confirmed by the Department (s. 42).

SUBSECTION (10).—*Enforcement of Provisions of Part II.*

1607. Where a local authority fail to make an improvement scheme⁴ after an official representation⁴ has been made to them, or fail to exercise their powers under Part II., the Department may cause a public local inquiry to be held (ss. 39 and 40). If they are satisfied that the local authority have not exercised their powers, or, having made a scheme, have failed to carry it out, they may bring the matter before the Court of Session (s. 40 (2) (3)).⁵

The Department may also, by order, require a local authority to exercise their powers under Part II., and if they fail to do so, the Department may themselves make and carry out a scheme and recover the expense from the local authority (s. 41).

SECTION 4.—PROVISION OF HOUSES FOR THE WORKING CLASSES (PART III. OF ACT).

SUBSECTION (1).—*Powers to Provide Houses and Lodging-houses.*

1608. A local authority⁶ may provide housing accommodation⁷ for

¹ 9 & 10 Geo. V. c. 57. As to how the claim to be lodged with the arbiter should be made up, see s. 5 (2), *ibid.*; and as to the effect of tenders made by the acquiring authority or the claimant on the incidence of costs incurred in the arbitration, see s. 5 (1), (3), (4), *ibid.* See also para. 1603, *supra*, note 5.

² 9 & 10 Geo. V. c. 57, s. 6 (1). ³ See para. 1585, *supra*. ⁴ See para. 1586, *supra*.

⁵ See also s. 34 for Department's power to intervene when a local authority have delayed unduly in completing their scheme, and s. 38, under which the Department may cause inquiry to be made where the medical officer has failed to carry out his duties under Part II.

⁶ See para. 1553, *supra*.

⁷ For the purposes of Part III., this includes lodging-houses (s. 43 (3)). This expression is not defined in the Act, but see Public Health (Scotland) Act, 1897, s. 3, for definition of "common lodging-house." Cf. *Parker v. Talbot*, [1905] 2 Ch. 643, and *Daley v. Lees*, [1926] 1 K.B. 40, where the expression was judicially considered. The provision of housing accommodation also includes cottages with a garden of not more than one acre.

the working classes ¹ by erecting dwelling-houses ² on any land acquired or appropriated by them, by converting buildings into dwelling-houses, ² by acquiring houses suitable for the purpose, or by improving any houses acquired by them, ³ and they may supply such houses with all requisite furniture and conveniences ⁴ (s. 43).⁵

SUBSECTION (2).—*Purposes for which Land may be Acquired.*

1609. Local authorities ⁶ are empowered under Part III. to acquire land, including houses or other buildings ⁷ thereon, as a site for erecting houses for the working classes ¹ (s. 44 (1) (a)). They may also acquire land for the purpose of selling, feuing, or leasing it to other persons with a view to their erecting such houses (s. 44 (1) (c)).⁸ With consent of the Department, they may acquire by agreement (but not otherwise) or lease houses suitable for the working classes (s. 44 (2)).

SUBSECTION (3).—*How Land may be Dealt with.*

1610. Where the local authority have acquired land for the purpose of Part III., they may (a) lay out streets or roads and open spaces; ⁹ (b) sell, feu, or lease the land to any person under the condition that that person will erect working-class dwelling-houses thereon, and when necessary will lay out streets or roads and open spaces; ⁹ (c) sell, feu, or lease the land or excamb it for land better adapted for those purposes; and (d) sell, feu, or lease any houses on the land subject to such conditions as they may impose in regard to the maintenance of the houses as dwelling-houses for the working classes (s. 45). The consent of the Department is required to (b), (c), and (d).¹⁰ The local authority may, for the purposes of Part III., exercise the same powers, whether of contract or otherwise, as they possess under the Public Health (Scotland) Act, 1897 ¹¹ (s. 46 of Housing Act).

SUBSECTION (4).—*Schemes for Provision of Houses for the Working Classes.*

1611. Local authorities are obliged to consider the needs of their districts with respect to the provision of houses for the working classes,

¹ See para. 1554, *supra*.

² For definition, see s. 119.

³ Only a burghal local authority can exercise these powers outside its own district, (s. 43 (d)). See also s. 49 as to local authority's power to execute works necessary or incidental to a housing scheme being carried out by them outside their district.

⁴ Water and gas companies are empowered to supply water and gas to such houses either without charge or on favourable terms (s. 65).

⁵ As to local authority's powers to provide shops, recreation grounds, etc., see para. 1642, *infra*.

⁶ See para. 1553, *supra*.

⁷ See *Conron v. London County Council*, [1922] 2 Ch. 283 (local authority held entitled to acquire beer houses).

⁸ They may also sell, feu, or lease the land with a view to its being used for purposes necessary or desirable for the development of the land as a building estate, *ibid*.

⁹ For definition, see s. 86 (4).

¹⁰ As to the application of capital money received, see s. 45 (3), and para. 1632, *infra*.

¹¹ 60 & 61 Vict. c. 38; see s. 144, *ibid*.

and to submit to the Department schemes for the exercise of their powers under Part III. (s. 47 (1), (2), and (5)).¹ Such schemes, when approved by the Department, are binding on the local authority (s. 47 (3)). Provision is made for joint action by two or more local authorities (s. 47 (6)). The local authority must carry the scheme into execution within such time as may be specified in it, or within such further time as may be allowed by the Department (s. 48).

SUBSECTION (5).—*Powers to Acquire Land.*¹

1612. Land for the purposes of Part III. may be acquired by a local authority by agreement in like manner as if those purposes were purposes of the Public Health (Scotland) Act, 1897,² and s. 144³ of that Act, so far as relating to the purchase of land by agreement, shall apply (s. 50).

1613. A local authority may also be authorised to purchase land compulsorily for the purposes of Part III. by means of an Order submitted to the Department and confirmed by them in accordance with the Third Schedule to the Act,⁴ but this power does not extend to land belonging to a local authority or which has been acquired by a corporation or company for the purposes of a railway, dock, canal, water, or other public undertaking, or to land forming part of any park, garden, or pleasure-ground, or which is required for the amenity or convenience of a house (s. 51).⁵ If the local authority propose to acquire land which is not immediately required for the purposes of Part III., such land can be acquired only by agreement (s. 44 (3)). A local authority may, with consent of the Department, appropriate for the purposes of Part III. any houses or land vested in them or at their disposal (s. 52).

1614. The trustees of any dwelling-houses for the working classes provided by private subscription or otherwise may sell, feu, or lease the houses to the local authority (s. 53).

SUBSECTION (6).—*Management and Inspection of Houses.*

1615. The management of houses provided by a local authority is vested in the local authority (s. 54), who may charge reasonable rents (s. 54 (3)). Such houses must be at all times open to inspection by the local authority or any officer authorised by them (s. 56). See s. 104 for penalty for refusing admission.

¹ As to preserving historical or artistic buildings and natural amenities of the locality, see s. 47 (3). For restrictions on acquiring certain lands, see paras. 1638 *et seq.*, *infra*.

² 60 & 61 Vict. c. 38.

³ This section empowers local authorities to purchase by agreement or otherwise any lands within or without their district, and, by agreement, to take on lease, sell, or exchange any lands within or without their district.

⁴ See the Housing (Scotland) Act (Compulsory Purchase) Order, 1925, dated 29th June 1925, and s. 89 of Housing Act, for power to enter on land compulsorily acquired. See also s. 115, which exempts a local authority from payment of land tax or poor rate on land acquired during the execution of works.

⁵ See para. 1611, *supra*.

SUBSECTION (7).—*By-laws as to Houses and Lodging-houses.*

1616. Local authorities may make by-laws for the management of houses provided by them (s. 55 (1)). As regards lodging-houses ¹ provided by them (*i.e.* houses not occupied as separate dwellings), they must make by-laws ² for the purpose of ensuring their proper use (s. 55 (2) and (3)). It is also the duty of local authorities of burghs to make by-laws ³ for regulating the density of building, preventing overcrowding, securing the provision of conveniences, etc., in the case of houses occupied by the working classes (s. 59),⁴ and local authorities of districts other than burghs must make by-laws for regulating the occupancy of such houses and for preventing overcrowding (s. 60).⁵

SUBSECTION (8).—*Provision of Houses by Companies and Public Utility Societies.*

1617. Railway, dock, harbour, trading, and manufacturing companies may provide houses for persons of the working class employed by them notwithstanding any Act or rule of law to the contrary (s. 58), and local authorities or county councils may promote and assist public utility societies ⁶ whose objects include the erection of such houses (s. 57).

SUBSECTION (9).—*Corporations may Sell Land for Housing Purposes.*

1618. Corporations holding land may dispose of it for the erection of houses for the working classes for such consideration as is the best that can reasonably be obtained, having regard to the purpose, notwithstanding that a higher consideration might have been obtained if the land had been disposed of for another purpose (s. 63).

SUBSECTION (10).—*Enforcement of Local Authority's Duties under Part III.*

1619. Where a complaint ⁷ is made to the Department that a local authority have failed to exercise their powers under Part III., they may hold a public local inquiry, and if after such inquiry they are satisfied that the local authority have failed to carry out their duties,

¹ See *Daley v. Lees*, [1926] 1 K.B. 40.

² See s. 84, which provides that the provisions of ss. 183 to 187 of the Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), which relate to by-laws under that Act, are to apply to by-laws made under the Housing Act.

³ See note 2.

⁴ Some of the by-laws apply to existing houses, others to new houses only (proviso to s. 59). As to "new buildings," see *Cammell, Laird & Co. v. Brownbridge*, 1919, 121 L.T. 471; *Ballard v. Horton's Estate*, 1926, 24 L.G.R. 449.

⁵ See also Housing, Town Planning, etc. (Scotland) Act, 1919, s. 43 (unrepealed), which enables local authorities of districts other than burghs to make additional by-laws.

⁶ For definition, see s. 119.

⁷ Any four or more local government electors, or a county council, parish council, or landward committee, may complain (s. 61 (1)).

the matter may be brought before the Court of Session (s. 61). The Department are empowered to act in place of a local authority who have failed to submit a scheme under Part III. or to fulfil their obligations under any such scheme (s. 62).

SECTION 5.—FINANCIAL PROVISIONS (PART IV. OF ACT).

SUBSECTION (1).—*Expenses of Local Authorities, etc.*

1620. All expenses incurred by a local authority in the execution of Parts I., II., and III. are defrayed out of the public health general assessment, but are not reckoned in any calculation as to the statutory limit ¹ of that assessment ² (s. 66 (1)). All expenses incurred by a county council (when not acting as a local authority under the Act) are defrayed out of the general purposes rate.³ The ratepayers of a police burgh are not assessable by the county council for any such expenses (s. 67).

SUBSECTION (2).—*Borrowing by Local Authorities, etc.*

(i) *For Purposes of Act.*

1621. The consent of the Department is required to all borrowing under the Act. With such consent, a local authority may borrow for the purposes of Parts I.,⁴ II., and III., and for the purpose of making loans or fulfilling guarantees given by them under Part IV. The money may be borrowed on the security of the public health general assessment in the same manner as for the provision of permanent hospitals under the Public Health (Scotland) Act, 1897⁵ (s. 68 of Housing Act).

(ii) *Where Scheme under Part III. is outside Local Authority's District.*

1622. A local authority carrying out a scheme under Part III. outside their own district⁶ may borrow to defray the expenses incurred by them, and the local authority of the district in which the scheme is being carried out may borrow for the purposes of any agreement entered into by them with the other local authority (s. 70).

¹ No limit in burghs; see Burgh Sewerage (Scotland) Act, 1901, s. 7, which repeals s. 137 of the Public Health (Scotland) Act, 1897, in so far as it applies to burghs. Limit in rural districts, 1s. per £ (*ibid.*).

² As to Department's power to declare that expenses incurred by the local authority of a district other than a burgh under Part III. are to be levied as general expenses on one or more specified parishes or special districts, see s. 66 (2).

³ See Local Government (Scotland) Act, 1889, ss. 26 and 27.

⁴ Borrowing under Part I. is limited to meeting the cost of repairs and works carried out by local authorities and compensation payable for obstructive buildings.

⁵ 60 and 61 Vict. c. 38, s. 141. In the case of a district other than a burgh, the county council alone can borrow, not the district committee; see s. 17 (2) (a), Local Government Act, 1889.

⁶ See para. 1611, note 1, *supra*.

(iii) *Power of County Councils to Borrow, Lend, etc.*

1623. Subject to the provisions of s. 67 of the Local Government (Scotland) Act, 1889,¹ county councils may borrow for the following purposes, viz.: (a) To assist a public utility society; ² (b) to make loans to any local authority within their area; and (c) to make advances, etc., under s. 75 of Housing Act (s. 69 (1)). The Department's consent is required to (b) and (c).

(iv) *Local Bonds.*

1624. Local authorities or county councils may, with consent of the Department, borrow money by the issue of bonds ³ in accordance with the provisions of the Fourth Schedule to the Act. Provision is made for a joint issue of local bonds by two or more local authorities or county councils (s. 71).

SUBSECTION (3).—*Loans by Public Works Loan Commissioners.*(i) *To Local Authorities.*

1625. These commissioners may grant loans to local authorities or county councils for the purpose of enabling them to make advances or fulfil guarantees ⁴ under s. 75 of the Act (s. 72), or for the erection of houses or for other purposes under the Housing Act. All such loans must be recommended by the Department.⁵

(ii) *To Trading Companies, Public Utility Societies, etc.*

1626. The commissioners may also make advances to certain companies or societies and persons ⁶ for the purpose of constructing or improving houses for the working classes, and in the case of a public utility society ⁷ for the purchase of such houses. The loans are subject to conditions as to period of repayment, maximum amount which may be advanced, interest, etc. (s. 73).

SUBSECTION (4).—*Loans by Local Authorities for Provision of Houses.*(i) *For Improving Housing Accommodation.*

1627. A local authority may lend to the owner of a house or building the whole or part of the cost of reconstructing or improving it where the

¹ The period for repayment allowed under s. 67 of the Local Government Act, 1889, is extended by s. 69 (2) of Housing Act.

² For definition, see s. 119.

³ See the Housing (Local Bonds) Regulations (Scotland), 1926, dated 21st April 1926. Such bonds are exempt from stamp duty (Fourth Schedule of Act, clause 2).

⁴ See para. 1628, *infra*.

⁵ Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 142.

⁶ For enumeration, see s. 73 (2); see also s. 58, which empowers certain companies, etc., to provide houses for the working classes (para. 1617, *supra*).

⁷ For definition, see s. 119; see also s. 57, which empowers local authorities to assist such societies (para. 1617, *supra*).

works proposed will make it in all respects fit for habitation as a house for the working classes (s. 74).¹

(ii) *For Increasing Housing Accommodation.*

1628. A local authority or a county council may, subject to conditions approved by the Board—

- (a) Advance money to persons or bodies of persons (i) constructing or altering houses, or (ii) acquiring houses begun to be erected after 25th April 1923, whether such houses are within or without the area of the local authority or county council;
- (b) guarantee the repayment to building societies, etc., of advances made by them to their members to enable them to build or acquire houses begun after said date; and
- (c) in the case of the conversion ² of a house into two or more separate flats, refund during a period not exceeding twenty years part of the rates payable in respect of such flats (s. 75 (1)).³

(iii) *To other Local Authorities.*

1629. Where a housing scheme under Part III. is being carried out by a local authority outside their own district,⁴ they may, subject to the Department's approval, advance to the local authority of the district in which the scheme is being carried out such sums as may be required by the last-mentioned local authority for constructing works in connection with the scheme (s. 76).

SUBSECTION (5).—*Accounts and Audit.*

1630. Local authorities must keep separate accounts of their receipts and expenditure under Parts I., II., and III., and they are audited in the same way as the authority's other accounts (s. 77 (1) and (2)).⁵

SUBSECTION (6).—*Application of Price Received for Land.*

1631. The proceeds of the sale of any land acquired by a local authority for any of the purposes of the Act must be applied for any purpose, including repayment of borrowed money, for which capital money may be applied, and which is approved by the Department (s. 78).

¹ The loan must not exceed one-half of the value of the property unless additional security is given, and before lending, the local authority must satisfy themselves that the works have been carried out satisfactorily (s. 74).

² See para. 1637, *infra*.

³ For conditions as to size and value of houses and flats, terms of advances, etc., see s. 75 (2), (3), and (4).

⁴ See para. 1608, note 3, *supra*.

⁵ As to the treatment of receipts and expenditure in respect of land acquired under Part III. but appropriated for rehousing purposes, see s. 77 (3).

SECTION 6.—GENERAL (PART V. OF ACT).

SUBSECTION (1).—*Rehousing by Undertakers.*¹

1632. Where, under the powers given by any local Act, Provisional Order, or Order having the effect of an Act, any land is acquired, whether compulsorily or by agreement, by any authority, company, or person, or where any land is acquired compulsorily under any general Act other than the Housing Act, the provisions in the Fifth Schedule apply with respect to the provision of housing accommodation for the working classes (s. 79).²

SUBSECTION (2).—*Building Regulations and By-laws.*(i) *Relaxation of Building Regulations.*

1633. Building regulations³ which are inconsistent with plans and specifications approved by the Department in connection with any of the housing schemes specified in s. 80 (4) do not apply to new buildings or new streets constructed in accordance with such plans and specifications (s. 80 (1)). Further, where the Department have approved plans which are inconsistent with the building regulations for the district, any proposals for the erection of buildings and the laying out of new streets which do not form part of any of those housing schemes may be carried out if the local authority or, on appeal, the Department are satisfied that they involve departures from such regulations only to the like extent as the plans and specifications so approved (s. 80 (2)).⁴

(ii) *By-laws Relating to New Streets.*

1634. To facilitate the erection of dwelling-houses, the Department may prescribe a code of building by-laws relating to the level, width, and construction of new streets, but it has no effect until adopted by a local authority (s. 81).⁵

¹ For definition, see para. 12 of Fifth Schedule.

² The effect of this provision is that where the undertakers have power to take working-men's dwellings (as defined in the schedule) occupied by thirty or more persons belonging to the working class (as defined in the schedule), the undertakers must not enter on any such dwellings until the Department have either approved of a housing scheme under the schedule, or have decided that such a scheme is not necessary (para. 1 of schedule).

³ For definition, see s. 119.

⁴ Local authorities have no general power to relax by-laws, nor can they make an agreement accepting an infringement of their own by-laws (*Bean & Sons v. Flaxton Rural District Council*, 1928, 92 J.P. 121; (C.A.) 139 L.T. 320). The special power conferred by s. 30 enables them to allow departure from the local building regulations only to the like extent as in the case of plans approved by the Department for housing schemes made by the public bodies described in subs. (4).

⁵ Where the code is adopted, the local authority do not require to comply with s. 318 of the Burgh Police (Scotland) Act, 1892, which provides for confirmation by the Sheriff of by-laws made by them, or with the corresponding provisions of any local Act. The Department have not yet prescribed any code.

(iii) *Revocation of Unreasonable By-laws.*

1635. If the Department are satisfied that the erection of buildings within any burgh or district is unreasonably impeded by the existence therein of any by-laws relating to new streets or buildings, they may require the local authority to revoke them or to make new ones. If the local authority fail to do so, the Department may themselves revoke the by-laws and make new by-laws (s. 82).¹

(iv) *By-laws as to Accommodation for Seasonal Workers.*²

1636. Local authorities may, and if required by the Department must, make by-laws with respect to certain specified matters—*e.g.* nature and extent of accommodation to be provided for such workers, provision for sleeping accommodation and separation of the sexes, inspection of the premises, etc. (s. 83 (1)). Housing accommodation in accordance with the by-laws must, in the case of potato workers, harvesters, fruit-pickers, and other seasonal workers, be provided by the farmer or fruit-grower employing them. If the provision of such accommodation involves the erection of additional buildings, the farmer or fruit-grower may require the landlord to erect such buildings to be arranged or determined (s. 83 (3)).

SUBSECTION (3).—*Conversion of a House into two or more Dwellings.*

1637. Where it is proved to the satisfaction of the Sheriff,³ on an application by the local authority or the feuar or lessee of a house,⁴ that, owing to changes in the character of the neighbourhood, it cannot readily be let as a single dwelling, but could readily be let if converted into two or more dwellings, and that the feu-charter or lease does not admit of such conversion, the Sheriff, after giving any person interested an opportunity of being heard, may vary the conditions of the charter or lease so as to enable the house to be so converted. The Sheriff's decision is final (s. 85).

SUBSECTION (4).—*Restriction on Acquisition of Certain Lands.*(i) *Commons and Open Spaces.*

1638. Where any scheme or Order under the Act authorises the acquisition of any common or open space, Parliamentary confirmation

¹ The Department have not yet taken any action under this section, the provisions of s. 80 (1) (see para. 1633, *supra*) having enabled them to override any building regulations which impeded the execution of housing schemes promoted by local authorities.

² For definition, see s. 83 (4).

³ Does not include Sheriff-Substitute.

⁴ The section is not confined to houses for the working classes, but is of general application; see *Porchester Gate* (No. 4). *Paddington, re Johnston v. Maconochie*, [1921] 1 K.B. 239 (C.A.). As to what the applicant must prove, what is included in the term "neighbourhood," and what constitutes "changes in character," see *Alliance Economic Investment Co., Ltd. v. Berton*, 1923, 92 L.J. K.B. 750 (C.A.).

is required,¹ except where the scheme or Order provides for giving land in exchange, certified by the Department after consultation with the Department of Agriculture for Scotland, to be equally advantageous to persons interested and to the public (s. 86).

(ii) *Land near Royal Palaces, etc.*

1639. Before preparing any scheme or Order which includes land within the prescribed distance² from any of the royal palaces or parks, the local authority must communicate with the Commissioners of Works, and the Department must consider any recommendations made by them before confirming the scheme or Order (s. 87).

(iii) *Ancient Monuments, etc.*

1640. Nothing in the Act authorises the acquisition of any land which is the site of an ancient monument or other object of archæological interest (s. 88).³

SUBSECTION (5).—*Special Powers and Duties of Local Authorities.*

(i) *Provision of Shops, Recreation Grounds, etc.*

1641. A local authority may, with consent of the Department, provide shops, recreation grounds, or other buildings or land which, in the opinion of the Department, will benefit the persons for whom the local authority are providing housing accommodation (s. 90).

(ii) *Enforcement of Obligations against Owner of Land.*

1642. Where the local authority have sold land acquired by them, and the purchaser has entered into an obligation with them concerning the land, they may enforce it against the persons deriving title under him (s. 91).

(iii) *Sale of Land and Houses.*

1643. It is not obligatory upon a local authority to sell any land or houses acquired or constructed by them unless ordered to do so by the Department (s. 94).

(iv) *Donations of Land, etc.*

1644. A local authority may accept a donation of land or money or any property for any of the purposes of the Act (s. 95).

SUBSECTION (6).—*Powers of the Department.*

(i) *Local Inquiries.*

1645. For the purpose of the execution of their powers under the Act, the Department may cause such local inquiries to be held as they

¹ This is the only case in which the approval of Parliament is still required.

² Half a mile. See Housing and Town Planning (Land near Royal Palaces and Parks) Regulations (Scotland), 1925, dated 29th June 1925.

³ See the Ancient Monuments Consolidation and Amendment Act, 1913 (3 & 4 Geo. V. c. 32).

think fit. The expenses incurred are payable by the local authorities and persons concerned as the Department may direct (s. 96).

(ii) *Reports on Crowded Areas.*

1646. If it appears to the Department that owing to density of population, or other reason, it is expedient to inquire whether the Act should be enforced in any area, they may call for a report by the local authority as to the population of the area, etc. (s. 97).

(iii) *Arrangements between the Department and other Departments.*

1647. The Department may arrange with other Government Departments for their exercising the Department's powers under the Act (s. 98).

SUBSECTION (7).—*Notices, Orders, etc.*

(i) *Service on Local Authority.*

1648. Any notice, summons, etc., for a local authority may be served by delivering it to their clerk or leaving it at his office with some person employed there, or by sending it by registered post to the local authority, or their clerk, at his office (s. 99).

(ii) *Authentication of Orders and Notices.*

1649. An Order by a local authority must be under seal and signed by their clerk or his deputy, or where they have not a seal it must be signed by two or more of their members and their clerk or his deputy. A notice or other written document proceeding from a local authority must be signed by their clerk or his deputy (s. 100).

(iii) *Service of Notices, etc.*

1650. Subject to the above provisions, any notice, Order, etc., under the Act may be served by (a) delivery to the person; or (b) leaving it at his usual or last known place of abode; or (c) sending it in a prepaid registered letter to him at that place, or in the case of an incorporated company or registered society, to the secretary at the registered or principal office; or (d) if addressed to the "owner"¹ or "occupier"¹ of premises, by delivering it to some person on the premises, or if no person is there, then by affixing it to some conspicuous part of the premises (s. 101 (1)).

(iv) *Department may Prescribe Forms and Dispense with Notices.*

1651. The Department may prescribe the forms of documents required under the Act.² These forms or forms as near thereto as circumstances

¹ As to dispensing with name and description of owners and occupiers, see s. 101 (2). See also s. 108 as to dispensing with these particulars in proceedings under Part I. For definition of "owner," see s. 119, and cases cited at note 1, para. 1563, *supra*.

² See Housing (Form of Orders, Notices, etc.) Order (Scotland), 1925.

admit must be used in all cases.¹ They may also dispense with advertisements and notices on reasonable cause being shewn (s. 102).

SUBSECTION (8).—*Appeals to Sheriff.*²

1652. The Sheriff may make such order as he thinks equitable. He may confirm, vary, or quash the notice or Order appealed against, and his order is binding and conclusive on all parties. He may also, at any stage of the proceedings on appeal, and must, if so directed by the Court of Session, state a case for the Court's opinion on any question of law.³ Any notice or Order appealable to the Sheriff does not become operative until the time for appealing has elapsed, or, if an appeal is made, it is determined or abandoned. Until the notice or Order is operative no steps may be taken under it (s. 103).

SUBSECTION (9).—*Offences, etc.*

(i) *Obstructing Officers of Local Authority, etc.*

1653. Any person obstructing the Medical Officer of Health, or any officer of the local authority, or any officer of the Department, in the performance of their duties under the Act is liable to a fine not exceeding £20 (s. 104).⁴

(ii) *Preventing Execution of Repairs.*

1654. If the occupier of any premises prevents the owner or his agents or workmen from carrying out any of the provisions of Part I., or if the owner or occupier prevents the officers or workmen of the local authority from so doing, the Sheriff, any two justices of the peace, or any magistrate may order the person at fault to permit the work to be done. If he fails to comply with the Order he is liable to a fine not exceeding £20 (s. 105).

(iii) *Damage to Houses.*

1655. Any person who wilfully or by culpable negligence damages any house provided for the working classes, or any of the fittings (including drainage and water supply) or any fence, is liable to a penalty not exceeding forty shillings (s. 106).

(iv) *Persons Interested Voting as Members of Local Authority.*

1656. A member of a local authority is prohibited under a penalty of £50 from voting on any question arising under the Act if it relates

¹ See *Rayner v. Stepney Corporation*, cited note 6, p. 637, *supra*.

² For procedure, see Act of Sederunt, 21st January 1926; *Kirkpatrick v. Maxwelltown Town Council*, 1912 S.C. 288. As to Sheriff's power to award expenses, see *Steele v. Middle Ward of Lanarkshire*, 1928, 44 Sh. Ct. Rep. 249.

³ This is not a provision for a further appeal from the Sheriff, but it is a provision that, in the course of the appeal, the Sheriff may, if he likes, state a case for the opinion of the Court of Session, per Lord Dunedin in *Johnston's Trs. v. Glasgow Corporation*, 1912 S.C. 300.

⁴ See also s. 105 (1) (b); *Arlidge v. Scrase*, [1915] 3 K.B. 325; 1915, 79 J.P. 467.

to any property in which he is beneficially interested, but a person who occupies or purchases a house belonging to the local authority is not disqualified from being a member of the authority (s. 107).

SUBSECTION (10).—*Power of Entry.*

1657. Any person authorised in writing by a local authority or the Department may, at all reasonable times and on giving the prescribed notice,¹ enter any house or premises for (a) survey and valuation in the case of any houses, etc., which may be purchased compulsorily; (b) survey and examination in the case of any house in respect of which a closing order² or demolition order³ has been made; or (c) survey and examination where such is necessary to determine whether any powers under the Act should be enforced (s. 109).

SUBSECTION (11).—*Heir of Entail may Sell or Feu Land.*

1658. An heir of entail in possession of an entailed estate is empowered to sell or feu any part of the estate to a local authority for any purpose for which they may acquire land under the Act, or to a public utility society, etc., for the purpose of providing houses for the working classes, without obtaining the consent of the next heir. The price received must be invested for behoof of the heir of entail in possession and succeeding heirs (s. 110).⁴

SUBSECTION (12).—*Two-roomed Houses, etc.*

1659. No house with less than three apartments may be erected for human habitation without the consent of the local authority, which is not to be given save in exceptional circumstances (s. 111).

SUBSECTION (13).—*Exclusion of Rent Restriction Acts.*

1660. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or Acts amending it, do not affect the provisions of Part I. relating to obtaining possession of a house closed by closing order,² or prevent the local authority from obtaining possession of any house required for the exercise of their powers under the Act, or under any scheme⁵ made under the Act, or any enactment repealed by it (s. 112).

SUBSECTION (14).—*Disposal of Purchase or Compensation Money.*

1661. Any such money payable by one local authority to another for lands, etc., may be paid and applied as the Department determine,

¹ Form No. 21, Housing (Form of Orders, Notices, etc.) Order (Scotland), 1925.

² See paras. 1562 *et seq.*, *supra*.

³ See paras. 1568 *et seq.*, *supra*.

⁴ The subjects referred to in s. 4 of the Entail (Scotland) Act, 1914 (Mansion House, etc.), are excepted from this provision.

⁵ See *Parry v. Harding*, [1925] 1 K.B. 111 (no obligation on local authority to shew that alternative accommodation is available where the house is required for an improvement scheme).

in place of being paid into bank as provided by the Lands Clauses Act ¹ (s. 113).

SUBSECTION (15).—*Trusts for Housing Purposes.*

1662. Where it appears to the Department that the institution of legal proceedings is desirable with respect to property left under any trust for the provision of dwelling-houses for the working classes, they may certify the case to the Lord Advocate, who may institute legal proceedings. Before preparing any scheme the Court must obtain the views of the Department (s. 116).²

SECTION 7.—TEMPORARY MEASURES FOR ENCOURAGING BUILDING.

SUBSECTION (1).—*Assistance towards Erection of Houses.*

1663. For a limited period financial assistance is available under the Housing, etc. Act, 1923,³ and the Housing (Financial Provisions) Act, 1924,⁴ for the purpose of promoting the erection of houses by local authorities and other bodies and by private builders. To be eligible for such assistance, the houses must comply with certain conditions and be within the limits of superficial area laid down in the Acts.⁵ For fuller particulars the Acts themselves should be consulted, and also the circular explanatory thereof issued by the Scottish Board of Health on 22nd September 1924.

SUBSECTION (2).—*Slum Clearance Grant.*

1664. With a view to assisting local authorities to carry out schemes for the improvement of insanitary areas,⁶ a grant, known as the slum clearance grant, is provided under ss. 1 (3) and 23 (5) of the Housing, etc. Act, 1923,³ towards meeting the estimated average annual loss in carrying out such schemes, the grant being not more than one-half of the annual loss. Under such schemes local authorities must provide rehousing accommodation for the tenants who will be displaced from the insanitary houses to be closed or dealt with by them. These insanitary houses may be dealt with either (1) under an improvement or reconstruction scheme ⁶ made under Part II. of the Housing Act, 1925, or (2) by means of closing ⁷ or demolition orders ⁸ under Part I. of that Act, or by the other means specified in s. 23 (5) of the Housing, etc. Act, 1923.

SUBSECTION (3).—*Housing of Rural Workers.*

1665. Financial assistance of a temporary nature is available under the Housing (Rural Workers) Act, 1926,⁹ towards the reconstruction

¹ See ss. 67 and 75 of the Lands Clauses Consolidation (Scotland) Act, 1845.

² For definition of Housing Trust, see s. 119.

³ 13 & 14 Geo. V. c. 24.

⁴ 14 & 15 Geo. V. c. 35.

⁵ For circumstances in which houses erected were held not to qualify for increased subsidy under the 1924 Act see *John G. Stein & Co. v. Eastern District Committee of the County Council of Stirling*, 1927 S.C. 659; 1928 S.C. (H.L.) 1.

⁶ See paras. 1583 *et seq.*, *supra*.

⁷ See para. 1562 *et seq.*

⁸ See para. 1567 *et seq.*

⁹ 16 & 17 Geo. V. c. 56.

and improvement of houses and other buildings that provide, or may be adapted to provide, accommodation for agricultural workers and for persons whose economic condition is substantially the same. Local authorities ¹ may, and must if so required by the Department, submit schemes for the approval of the Department setting forth the amount and conditions of the assistance (s. 1 (1)). As the Act is applicable, not only to dwellings of agricultural workers, but also to those of persons who would not ordinarily pay a rent in excess of that paid by agricultural workers, schemes may conceivably be put in operation in burghal as well as in county areas. No assistance can be given where the value (in the opinion of the local authority) of the dwelling after completion of the works exceeds £400, or where the estimated expenditure is less than the minimum of £50 specified in the Act, or unless the application for assistance is made before 1st October 1931. Towards the expenses ² incurred by a local authority in giving assistance, the Department make contributions as specified in s. 4. For details of the scheme and the conditions applicable thereto, the Act should be consulted, and also the circular issued by the Scottish Board of Health dated 5th February 1927.

SECTION 8.—SMALL DWELLINGS ACQUISITION ACTS, 1899 TO 1923.

1666. These Acts empower local authorities to advance money to a resident in a house to enable him to acquire the ownership of it, or to a person intending to construct a house for his own occupation. The requirement in the Act of 1899 ³ that the applicant had to reside in the house has effect for a period of three years only from the date when the advance is made, or from the date on which the house is completed, whichever is the later, but the local authority may waive this condition at any time. The amount which may be advanced is in the discretion of the local authority, subject to a maximum of 90 per cent. of the value of the house, but an advance must not be made where the market value of the house exceeds £1200. Advances may also be made during construction up to 50 per cent. of the value of the work done.

1667. The central authority is the Secretary of State for Scotland (s. 11 (1), 1899 Act), and not the Department of Health for Scotland. The local authority is (a) in counties (including the burghs as defined in the Burgh Police (Scotland) Act, 1892, situated therein, and having a population of less than 7000 according to the last census), the county council; and (b) in other burghs, the town council (s. 12 (1), *ibid.*).⁴ The Acts should be consulted for details.

¹ The local authority is the same as under the Housing Act, s. 8 (g), *ibid.*; see para. 1553, *supra*.

² The expenses incurred by local authorities are defrayed in like manner as expenses incurred in the execution of the Housing Act, and they have the same powers of borrowing as under that Act (s. 8 (g)); see paras. 1620 and 1621, *supra*.

³ 62 & 63 Vict. c. 44, as amended by s. 39 (Housing, Town Planning, etc. Act, 1919 (9 & 10 Geo. V. c. 60), and s. 22, Housing, etc. Act, 1923 (13 & 14 Geo. V. c. 24); see also s. 23 (18), *ibid.*, as to rate of interest on advances.

⁴ Cf. paras. 1552 and 1553, *supra*.

HUSBAND AND WIFE.

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SECTION 1.—INTRODUCTORY.

1668. The status of husband and wife results from the lawful union of a man and a woman in Christian marriage. The expression Christian marriage includes any monogamous marriage duly celebrated according to the form of the *lex loci celebrationis*, whether in a Christian country or not.¹ It also includes any marriage, although irregularly contracted, which is recognised as such by the *lex loci celebrationis*, e.g. in Scotland marriage by declaration *de præsentis*, by promise *subsequente copula*, or by habit and repute. See MARRIAGE.

¹ *Brinkley v. Attorney-General*, 1890, 15 P.D. 76.

SECTION 2.—RIGHTS OF HUSBAND OVER HOUSEHOLD AND WIFE'S PERSON.

1669. The husband is the *dignior persona* and head of the household, and it is the wife's duty in things lawful to obey him. In the words of Stair, "The husband is lord, head, and ruler of the wife by the express ordinance of God."¹ So inherent in the nature of marriage is the husband's right to be the head of the house, that a renunciation of it by him is void as *contra bonos mores*.² He is entitled to choose where the matrimonial home shall be; and it is the wife's duty to live with him in any place, whether at home or abroad, as he shall determine.³ Whatever a woman's domicile may be before marriage, it then becomes that of her husband; and if he changes his domicile during the marriage, hers is changed also.⁴ It is also for him to decide upon what scale the domestic establishment is to be kept up.⁵ A husband is not entitled to beat his wife, or to imprison her in his house.⁶ Nor can he compel her to live with him. If she obstinately refuses to do so, without reasonable cause, his remedy is to decline to aliment her, and at the end of four years to raise an action of divorce for desertion. Conversely, if the husband turns the wife out of doors she cannot compel him to take her back. Her remedy is to claim aliment, and to get a divorce for desertion after four years, or, unless the circumstances are very exceptional, obtain a judicial separation on the ground of cruelty.⁷ A husband can obtain an order to have his wife removed from his house and to interdict her return, he finding caution to pay her reasonable aliment.⁸ The husband may prohibit any person, even his wife's relations, from visiting her in his house.⁹

1670. A husband may sue for damages for the death of his wife by the fault of another.¹⁰ In one case it was strongly urged by Lord Young that he is also entitled to sue for damages for personal injury to his wife although, since the Married Women's Property Act, 1881,¹¹ the wife is entitled herself to sue. A husband is entitled to sue an action of damages against the seducer of his wife, either without having raised an action of divorce¹² or after having obtained a decree for divorce.¹³

¹ Stair, i. 4, 9.

² *Colquhoun v. Colquhoun*, 1804, Mor. App., "Husband and Wife," No. 5; Bell's Prin., s. 1562.

³ See ADHERENCE, Vol. I. p. 113, *ante*.

⁴ Stair, i. 4, 9; *Carswell v. Carswell*, 1881, 8 R. 901; see other authorities in Walton on Husband and Wife, 2nd ed., p. 291.

⁵ See ALIMENT, Vol. I. p. 287, *ante*.

⁶ See Fraser, H. & W. i. 511; ii. 897; *The Queen v. Jackson*, [1891] 1 Q.B. 671; *Mackenzie v. Mackenzie*, 1895, 22 R. (H.L.) 32.

⁷ *Colquhoun v. Colquhoun*, *supra*; Ersk. i. 6, 19; Fraser, H. & W. i. 54; ii. 896.

⁸ *Maclure v. Maclure*, 1911 S.C. 200; *Colquhoun*, *supra*.

⁹ *Cadboll v. Cadboll*, 1758, 5 Bro. Supp. 475; *Waring v. Waring*, 1813, 2 Hagg. C.R. 153, at p. 159; Fraser, H. & W. ii. 897.

¹⁰ *Dow v. Brown*, 1844, 6 D. 534.

¹¹ 44 & 45 Vict. c. 21.

¹² *Maxwell v. Montgomery*, 1787, Mor. 13919; *Paterson v. Bone*, 1803, Mor. 13920; *Macdonald v. Macdonald*, 1885, 12 R. 1327. See DIVORCE, Vol. VI. p. 6, *ante*.

¹³ *Steedman v. Coupar*, 1743, Mor. 7337; *Baillie v. Bryson*, 1818, 1 Mur. 317; *Glover v. Samson*, 1856, 18 D. 609.

He may sue in respect of the rape of his wife as a wrong done to himself.¹ An action will also lie at the instance of a husband against any person, including the parents of the wife, who entices the wife away from him so as to deprive him of her society.²

SECTION 3.—RIGHTS OF HUSBAND IN AND OVER WIFE'S PROPERTY.

SUBSECTION (1).—*Communio Bonorum*.

1671. This phrase, borrowed from the French jurisprudence, is used by the institutional writers to denote the moveable estate of both spouses. According to the doctrine laid down by Stair,³ and followed by Erskine,⁴ there was a communion of goods between married persons. Into this communion or common stock fell the moveable estate of the husband and the moveable estate of the wife, except in so far as the latter was estate from which the *jus mariti*⁵ had been excluded, or was of the nature of *paraphernalia*.⁶ As, however, it was never disputed that the husband had absolute control of all the goods said to be in communion, and that the wife had no rights in them whatever during the subsistence of the marriage, the phrase *communio bonorum* was always misleading.⁷ Fraser has investigated the history of its introduction into our law.⁸

1672. By the old law the share of the moveable property contributed by each of the spouses to the common stock reverted to the survivor and the predecessor's representatives, on the dissolution of the marriage within year and day without the birth of a living child. This rule, invariably excluded where there was a marriage contract, was abolished by the Intestate Moveable Succession (Scotland) Act, 1855.⁹ The right of the representatives of a predeceasing wife to one-third or one-half, according as there were children or not, of the husband's moveable estate was also abolished.¹⁰ After this "the only practical result of the *communio bonorum*, if indeed it be a result of that at all, is the *jus relictæ*."¹¹ Since the Married Women's Property (Scotland) Act, 1881,¹² a wife's moveable estate no longer falls at marriage under the *jus mariti*, and the last vestige of this theoretical communion of goods may be said to have disappeared. In England the doctrine was never accepted.¹³

SUBSECTION (2).—*Jus Mariti*.

1673. Before the Married Women's Property Act, 1881,¹⁰ a woman's whole moveable estate passed to her husband on her marriage, unless

¹ *Black v. Duncan*, 1924 S.C. 738.

² See *Adamson v. Gillibrand* (O.H.), 1923, S.L.T. 328, and cases there cited.

³ i. 4, 9, 3. ⁴ i. 6, 12. ⁵ See para. 1673 *et seq.*, *infra*. ⁶ See para. 1719, *infra*.

⁷ *Fraser v. Walker*, 1872, 10 M. 837, per Lord Kinloch at p. 847.

⁸ H. & W. i. 648 *et seq.* ⁹ 18 & 19 Vict. c. 23, s. 7. ¹⁰ *Ibid.*, s. 6.

¹¹ *Fraser v. Walker*, 1872, 10 M. 837, per Lord Pres. Inglis. ¹² 44 & 45 Vict. c. 26.

¹³ See Pollock and Maitland, *History of English Law*, ii. 399 *et seq.*

his right had been renounced or excluded by an ante-nuptial marriage contract. Moveable estate which she acquired during the marriage vested in her husband, subject in certain cases to a claim introduced by the Conjugal Rights Act, 1861,¹ that he should make therefrom a reasonable provision for her maintenance. The husband was said to take the wife's estate in virtue of his *jus mariti*. The Act of 1881 abolished the *jus mariti* in marriages after its date, subject to certain limitations referred to below. The ways in which the *jus mariti* might be renounced or excluded, the extent to which it has been excluded by the statute, the effect of exclusion, and the question whether a foreign husband who acquired a Scottish domicile after the Act of 1881 was entitled to *jus mariti* are discussed below in connection with the husband's right of administration, as the same rules apply to both.² Although by the older writers the expression *jus mariti* is often used to include both the husband's curatorial power as well as his right of property at common law in the wife's moveable estate,³ the two rights are distinct and were discriminated at an early period.⁴ The husband's rights might be held to be excluded by implication where, although the terms of the deed were not very apt, its general effect was inconsistent with the view that the *jus mariti* was to subsist.⁵

1674. The cases in which the *jus mariti* still subsists are:

- (1) Where the marriage was contracted and the wife acquired right to moveable estate prior to July 18, 1881.
- (2) Where the marriage was prior to July 18, 1881, and the wife acquired moveable estate thereafter, if the Act is excluded by reason of the husband having, before its passing, made by irrevocable deed a reasonable provision for his wife in the event of her surviving him.⁶
- (3) Where heritage was vested in the wife prior to the Act the husband takes the rents accruing thereafter.⁷
- (4) It is not settled whether "a foreign" husband who acquired a Scottish domicile after the 1881 Act is entitled to *jus mariti*, but it is thought that the principle laid down by the House of Lords in the case of *De Nicols v. Curlier*,⁸ which decided that it was a principle of international law as recognised in England that the property rights of the spouses are not affected by a change of domicile subsequent to marriage, would also apply in Scotland.⁹

¹ 24 & 25 Vict. c. 86, s. 16.

² Stair, i. 4, 9; Ersk. i. 6, 13; Bell's Prin., s. 1563.

³ See para. 1676 *et seq.*, *infra*.

⁴ Fraser, H. & W. i. 676, 796; M'Kenzie, i. 6, 7; *Murray's Trs. v. Dalrymple*, 1745, Mor. 5843; *Foulis and Collington v. Collington*, 1667, Mor. 5828; *Annand and Collison v. Chessels*, 1774, Mor. 5844; 1775, 2 Pat. 369; *Bryce's Tr.*, 1878, 5 R. 722.

⁵ *Marshall's Factor v. Marshall*, 1897, 4 S.L.T. 282; and see cases cited under para. 1679, *infra*.

⁶ 44 & 45 Vict. c. 21, s. 3 (1).

⁸ [1900] A.C. 21.

⁷ *Horsbrugh v. Scott*, 1889, 16 R. 507.

⁹ See Walton, H. & W., 2nd ed., pp. 343 *et seq.*

1675. Where the husband's right exists he is the absolute owner, and may deal with estate which came to him in this way exactly as with any other part of his moveable estate, subject to the wife's claim to a reasonable provision therefrom.¹

SUBSECTION (3).—*Right of Administration.*

1676. This term denotes the right which the husband formerly enjoyed, as head of the family, to control the management of the wife's estate. In virtue of this right, unless renounced or excluded by deed or by statute, his consent was required to validate her deeds, *e.g.* a receipt or a discharge by her without his consent was not valid,² nor a sale of her heritage,³ nor a transfer of her moveables. Erskine says: "It also proceeds from the curatorial power of the husband, that all deeds done or granted by a wife without his consent are in themselves null, though they should relate to her own property, and make no encroachment on any right competent to the husband."⁴

1677. A husband was bound to exercise his curatorial power in the interest of his wife.⁵ Where strong cause was shewn, he might be compelled to find caution to administer his wife's estate for her behoof, or might even be removed from office, the wife being authorised to act by herself, or another curator being named.⁶ It was repeatedly held that where the subject of an action which a married woman desired to raise was something which, if recovered, would be her separate estate, although the right of administration might not be excluded from it, her husband could not prevent the action by arbitrarily refusing his consent. If necessary, the Court would dispense with it and appoint a *curator ad litem*.⁷

1678. It was at one time thought that the husband's right of administration was so inherent in the nature of the family, that it would be *contra bonos mores* to allow him to renounce it.⁸ But the husband's rights as *caput et princeps familiæ*, under which he may fix the common home where he chooses and has a limited authority over his wife and children, are to be distinguished from his right of administration in the limited sense of controlling her management of her own estate. His general right to be the head of the family he could not renounce.⁹

¹ 24 & 25 Vict. c. 86, s. 16; see *Mudie v. Clough*, 1896, 23 R. 1074; *Ferguson v. Jack's Exrs.*, 1877, 4 R. 393; *Fraser v. Walker*, 1872, 10 M. 837; *Fraser, H. & W. i.* 679.

² *Miller v. Galbraith's Trs.*, 1886, 13 R. 764. ³ *Dickson v. Blair*, 1871, 10 M. 41.

⁴ *Ersk. i.* 6, 22, s. 27; *Fraser, H. & W. i.* 797; *Dick v. General Life Assurance Co.*, 1900 (O.H.), 7 S.L.T. 446.

⁵ *Bryce's Tr.*, 1878, 5 R. 722, per Lord Gifford at p. 728.

⁶ *Bryce's Tr.*, *supra*; *Fraser, H. & W. i.* 798; cf. *Sillars v. Sillars*, 1911 S.C. 1207.

⁷ *Blair v. Burns*, 1829, 8 S. 264; *Hacket v. Gordon*, 1673, Mor. 6039; *Graham v. Hunter's Trs.*, 1831, 9 S. 543.

⁸ *Dickson v. Braidfoot*, 1705, Mor. 10395; *Dick and Dunbar v. Lady Pinkhill*, 1709, Mor. 5999; *Murray's Trs. v. Dalrymple*, 1745, Mor. 5842; *Collington v. Collington*, 1667, Mor. 5828.

⁹ *Bell's Prin.*, s. 1562; *Colquhoun v. Colquhoun*, 1804, Mor. App., "Husband and Wife," No. 5; *Collington, supra*.

But he may renounce his particular right of management of his wife's fortune.¹ He might renounce it by ante-nuptial marriage contract.² Before 1881, where it was intended that the lady should remain mistress of her own fortune, the invariable practice was for the husband to renounce both his *jus mariti* and his right of administration. The 1881 Act removed the right of administration from the income of the wife's moveable estate and the rents of her heritage, but as to the capital of her estate that right was left intact. It might be renounced by the husband by a post-nuptial marriage contract or other deed. It might be excluded by the giver of a fund to the wife, for a donor may attach any lawful condition to his bounty.³

1679. Exclusion or renunciation of the right of administration might be implied. The express exclusion of the *jus mariti* did not necessarily imply the exclusion of the right of administration.⁴ But the husband's power might be excluded by any words which clearly imported that intention. A renunciation by a husband of his *jus mariti* and all other right and title to the rents of subjects belonging to his wife, with a declaration that her own receipts should be effectual discharges, was held to imply the exclusion of the right of administration;⁵ as was also a clause in a deed which excluded the *jus mariti* and provided that the husband should have no concern with certain annuities, but that the wife's receipts should be sufficient therefor.⁶ Renunciation of the *jus mariti* might be inferred from facts and circumstances, as where the husband plainly shewed by a course of conduct that he did not lay claim to property to which he was entitled *ex jure mariti*.⁷ It would seem that as to a particular transaction, or the conduct of a particular piece of business, the husband's consent might be inferred from his lying by, in the knowledge that his wife was engaging in it, and not warning the other party that she was acting without his consent.⁸ But where the transaction was one for which writing was essential, it was necessary that his consent should, like the principal obligation, be in writing.⁹ Where a wife was deserted by her husband or was living apart from him with his consent, the Court might dispense with his consent to any deed relating to her estate.¹⁰

¹ *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470; *Annand v. Scott*, 1774, Mor. 5844, 2 Pat. 369; Ersk. i. 6, 14.

² Ersk., *loc. cit.*; Bell's Prin., s. 1563; *Bruce's Trs. v. Bruce's Trs.*, 1894, 21 R. 593; *McDougall v. City of Glasgow Bank*, 1879, 6 R. 1089.

³ Ersk. i. 6, 14; Fraser, H. & W. i. 783; *Annand, supra*; *Young v. Loudoun*, 1855, 17 D. 998; *McDougall v. City of Glasgow Bank, supra*.

⁴ *Bryce's Tr.*, 1878, 5 R. 722.

⁵ *Keppie v. Christie*, May 25, 1815, F.C.

⁶ *Gowan v. Pursell*, 1822, 1 S. 418; *Bruce's Trs. v. Bruce's Trs., supra*; *Irvine v. Cannon's Trs.*, 1883, 10 R. 731.

⁷ *Smith v. Smith's Trs.*, 1884, 12 R. 186; *Wright's Exrs. v. City of Glasgow Bank*, 1880, 7 R. 527; *Davidson v. Davidson*, 1867, 5 M. 710.

⁸ *Hill v. City of Glasgow Bank*, 1879, 7 R. 68, at p. 76; *Wright's Exrs., supra*; *Dickson v. Blair*, 1871, 10 M. 41.

⁹ *Dickson, supra*.

¹⁰ See *Niven, Petr.*, 1883, 20 S.L.R. 587; *Gibson, Petr.*, 1893, 1 S.L.T. 323; *Steel, Petr. (O.H.)*, 1916, 1 S.L.T. 125.

1680. The husband's right of administration has been entirely abolished by the Married Women's Property (Scotland) Act, 1920,¹ and a married woman has now the same powers of control and management of her estate as if she were unmarried. Prior to that Act a series of enactments excluded the right in certain cases. By the Conjugal Rights Act, 1861,² when the wife had obtained a protection order,³ property which she had acquired or might acquire after desertion, and property to which she had succeeded or might succeed or acquire right after such desertion, was vested in her exclusive of her husband's *jus mariti* and right of administration. The protection did not extend to property of which the husband or his assignee had obtained full and lawful possession before the petition, or against which, before that date, a creditor of his had done complete diligence (s. 4). By the same Act the *jus mariti* and right of administration were excluded from property acquired by her after a decree of judicial separation. In neither case did return to cohabitation restore the husband's rights as to estate which was the wife's when cohabitation was resumed (ss. 3 and 6). By the Married Women's Property Act, 1877,⁴ the *jus mariti* and right of administration were excluded after January 1, 1878, from the wages and earnings of a married woman, including money acquired by her through the exercise of any literary, artistic, or scientific skill. By the Married Women's Property Act, 1881,⁵ the rents and produce of heritable property in Scotland belonging to the wife were made no longer subject to the *jus mariti* and right of administration of the husband. As to a wife's moveable estate, the *jus mariti* was abolished but not the right of administration, except that the income was made payable to the wife on her individual receipt or to her order; but the wife was not entitled to assign the prospective income of her moveable estate or, unless with her husband's consent, to dispose of such estate. The Act applied to all marriages contracted on or after July 18, 1881, when the husband at the time of the marriage was domiciled in Scotland. In the case of marriages prior to its date the Act did not apply at all where the husband, before the Act, had by irrevocable deed made a reasonable provision for his wife in the event of her surviving him (s. 3); and where no such provision had been made, it applied only to the wife's estate to which she acquired right after its passing (*ibid.*). The husband's right of administration was not excluded from heritage the fee of which had vested in a wife married prior to the Act, although the income did not become payable to her until after the passing of the Act.⁶

1681. Where the husband's rights were entirely excluded the wife might deal with her separate estate as if unmarried, and might render her estate liable for the fulfilment of all obligations connected with its

¹ 10 & 11 Geo. V. c. 64.

³ See para. 1722, *infra*.

⁵ 44 & 45 Vict. c. 21.

² 24 & 25 Vict. c. 86.

⁴ 40 & 41 Vict. c. 29.

⁶ *Horsbrugh v. Scott*, 1889, 16 R. 507.

enjoyment or administration.¹ Where the *jus mariti* was excluded but not the right of administration—an unusual case before the 1881 Act, but the normal case under that Act as regards a wife's moveable capital and her heritage—the estate was not the husband's, but while he had the right of directing how it should be administered, he had to do so for his wife's behoof, and not for his personal advantage as opposed to hers.² As to rents of a wife's heritage not in Scotland, they would seem, when the husband was domiciled in Scotland before the marriage, to have fallen under the *jus mariti*. If he was not domiciled in Scotland, it would seem to have been otherwise, in view of the doctrine of tacit consent that the *lex domicilii* at the date of the marriage should govern the rights of spouses during its subsistence.³

SUBSECTION (4).—*Jus Relicti*.

1682. At common law a wife is entitled on her husband's death, or on divorce for his fault,⁴ to one-third of his free moveable estate if he leave lawful children by her or by a former wife, or to one-half if he leave no children. By s. 6 of the Married Women's Property (Scotland) Act, 1881,⁵ a corresponding share or interest in his wife's moveable estate is given to the husband of any woman who may die domiciled in Scotland, "subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." It is immaterial that the marriage was constituted, or the property acquired, prior to Act,⁶ or that the *jus mariti* was excluded by ante-nuptial marriage contract, if she died the absolute owner.⁷ The effect of divorce is not mentioned, and it has been held that a husband who divorces his wife is not entitled to *jus relictæ*.⁸ With this distinction the two rights correspond, and the rules of law with regard to *jus relictæ* apply to this statutory right of the husband, which is conveniently designated *jus relictæ*.⁹

SECTION 4.—LIABILITIES OF HUSBAND.

SUBSECTION (1).—*Aliment of Wife*.

1683. A husband is bound to supply his wife with necessary food and clothing. Failure to so do may afford ground for an action of judicial separation on the ground of cruelty, and if she is left destitute

¹ *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470; *Burnett v. British Linen Co.*, 1888, 25 S.L.R. 356; *Henderson v. Dawson*, 1895, 22 R. 895; Fraser, H. & W. i. 813. See also para. 1703 *et seq.*, *infra* (capacity of a married woman).

² *Bryce's Tr.*, 1878, 5 R. 722.

³ See *De Nicols v. Curlier*, [1900] A.C. 21, and para. 1674, *supra*.

⁴ See DIVORCE, Vol. VI. p. 6, *ante*. ⁵ 44 & 45 Vict. c. 21.

⁶ *Paterson v. Poë*, 1882, 10 R. 356; 10 R. (H.L.) 73.

⁷ *Fotheringham's Trs. v. Fotheringham*, 1889, 16 R. 873; *Simon's Tr. v. Neilson*, 1890, 18 R. 135.

⁸ *Eddington v. Robertson*, 1895, 22 R. 430.

⁹ *Buntine v. Buntine's Trs.*, 1894, 21 R. 714.

and becomes chargeable to the parish, the husband is liable to imprisonment.¹ A husband is not bound to aliment a wife who is living apart from him, unless she has left him with his consent or by reason of conduct on his part which would afford her a good defence to an action of adherence at his instance.² During cohabitation the wife's claim to aliment is postponed to the claims of the husband's creditors, and prior to the Married Women's Property Act, 1920, he could not, *stante matrimonio*, set aside goods belonging to him for the aliment of his wife so as to be beyond the reach of his creditors,³ because donations *inter virum et uxorem* were revocable *stante matrimonio*, and the right of revocation might be exercised by a trustee in bankruptcy. Under the Act of 1920 a husband may now make a provision for his wife *stante matrimonio* which will not be attachable by his creditors unless it has been made within a year and day of his sequestration.⁴

1684. Where the wife is living apart on account of the husband's misconduct or with his consent, he is liable for necessaries suitable to her position supplied to her, unless she has sufficient means of her own, or he is paying her a suitable allowance, or she has agreed to support herself. This liability has not been affected by the Married Women's Property Acts. Even if the wife has been guilty of adultery the husband continues liable for her support until he obtains decree of divorce—and accordingly he will be liable for necessaries supplied to her while living apart from him.² He will also be found liable for the wife's aliment *pendente lite* if he raises an action of divorce against her, and generally also if he raises an action of declaration of nullity of marriage.⁵

1685. A husband is bound to support his wife after decree of judicial separation, whether obtained at his instance or at hers,⁶ unless she is otherwise adequately provided for.⁷ But if the matrimonial tie is dissolved by divorce, at the instance of either spouse, the husband's liability for aliment of the wife is at an end. A wife who obtains a decree of divorce has no claim for support from her divorced husband. Her only claim on her own behalf is for payment of her legal rights or her conventional provisions as if he were naturally dead.⁸

SUBSECTION (2).—*For Aliment of Children.*

1686. A husband is bound to support his children until they are able to support themselves. He will accordingly be liable for necessaries supplied to a child, even if not living in his house, unless the child has been provided for *aliunde*.⁹ He is also liable for the aliment of children

¹ 8 & 9 Vict. c. 83, s. 80.

³ *Paterson v. Paterson*, 1861, 24 D. 215.

⁵ See ALIMENT, Vol. I. p. 297.

⁶ *Nisbet v. Nisbet*, 1896 (O.H.), 4 S.L.T. 158.

⁷ See JUDICIAL SEPARATION, Vol. VIII., *post*.

⁸ *Fraser, H. & W.* i. 854; *Stewart v. Stewart*, 1872, 10 M. 472.

⁹ *Stair*, i. 5, 7; *Ersk.* i. 6, 57; *Fraser, P. & C.* iii.; *Wallace*, 1672, Mor. 13425; see *Ligertwood v. Brown*, 1872, 10 M. 832.

² See ALIMENT, Vol. I. p. 296, *ante*.

⁴ 10 & 11 Geo. V. c. 64, s. 5.

the custody of whom has been awarded to his wife on his obtaining decree of divorce against her.¹ If an order for aliment is made in such a case under the powers given by the Conjugal Rights Act the order falls *quoad* each child when it attains minority.²

SUBSECTION (3).—*For Wife's Ante-Nuptial Debts.*

(i) *General.*

1687. At common law a married woman was exempt from personal diligence, and was not personally liable for her ante-nuptial debts.³ The creditor might constitute his debt in an action against both the spouses, but *quoad* the wife execution would have been superseded so long as the marriage subsisted.⁴ The protection fell with the marriage, and at its dissolution the wife became personally liable for her ante-nuptial debts.⁵ Although the husband was liable, he was not the proper debtor and might require that the wife's estate be first discussed;⁶ and if he paid such debts he was entitled to relief against her separate estate.⁷

1688. In the case of a marriage which took place before January 1, 1878, the husband is still liable during the marriage for such of his wife's ante-nuptial debts as are moveable by nature, *i.e.* which, if they had been due to her instead of by her, would have fallen under his *jus mariti*.⁸ It is immaterial that he received no fortune with her, or that he has renounced his *jus mariti*.⁹ After the dissolution of the marriage his liability is only *in quantum lucratus*, unless the debts have been fixed during the marriage as debts on his estate, *i.e.* unless a completed diligence has been done *stante matrimonio*, by which a *nexus realis* has been imposed on his property.¹⁰ An inchoate diligence, *e.g.* an arrestment not followed by a furthcoming, and any personal diligence against him, falls on the dissolution of the marriage.¹¹ Summary diligence on bills granted by a wife or on decrees against her is not competent against a husband.¹² As above stated the husband if compelled to pay his wife's debts has relief against her estate. If the wife predeceases the husband the creditor's remedy is against her representatives or her separate estate.¹³

¹ *Dunn v. Dunn*, 1842, 4 D. 454.

² *Watson v. Watson*, 1895, 28 R. 219.

³ *Gordon v. Campbell*, 1704, Mor. 6087; Ersk. i. 6, 19; Fraser, H. & W. i. 601.

⁴ *Gordon*, *supra*; *Graham v. Tours*, 1668, Mor. 12491.

⁵ *Killoch v. Sheriff of Murray's Ears.*, 1612, Mor. 5861; *Wilkie v. Stewart*, 1678, Mor. 5876; Bell's Prin., s. 1570; Ersk. i. 6, 16; Fraser, H. & W. i. 593.

⁶ *Stair*, i. 4, 17, 7; Ersk. i. 6, 17; *Wilkie*, *supra*; *Earl of Leven v. Montgomery*, 1683, Mor. 5876, 5803, 3217.

⁷ *Earl of Leven*, *supra*; *Gordon v. Inglis*, 1681, Mor. 5924; *Robertson v. Lyon*, 1821, 1 S. 48; Bell, Com. i. 676; Bell's Prin., s. 1571.

⁸ *Osborn v. Young and Menzies*, 1696, Mor. 5785; Bell's Prin., s. 1570.

⁹ *Simpson v. M'Lellan*, 1682, Mor. 5852; Ersk. i. 6, 16.

¹⁰ Ersk. i. 6, 17; Bell's Prin., s. 1571; *Wilkie*, *supra*; *Bryson v. Menzies*, 1698, Mor. 5869.

¹¹ *Douglas v. Stirling*, 1623, Mor. 5861.

¹² Bell's Prin., s. 1571; Bell, Com. i. 625; Fraser, H. & W. i. 595.

¹³ Bell's Prin., s. 1570; Ersk. i. 6, 26; Fraser, H. & W. i. 593.

But the husband and his heirs are liable for both heritable and moveable debts to the extent to which he was *lucratus* by the marriage.¹

1689. When the marriage took place on or after January 1, 1878, the husband is only liable to the extent of the "value of any property which he shall have received from, through, or in right of his wife at or before or subsequent to the marriage."² It is thought that this limited liability continues after the dissolution of the marriage. The words of the section "subsequent to the marriage" appear to mean during the marriage and after its dissolution. Apart from contract, in a marriage to which the Married Women's Property (Scotland) Act, 1881, applies, the husband receives no property from, through, or in right of his wife, and consequently he has now no liability *stante matrimonio* for her ante-nuptial debts. But any legal or conventional rights accruing to him through her at the dissolution of the marriage, including *jus relictii*, will, it seems, be subject to payment of her ante-nuptial debts.³ The Married Women's Property (Scotland) Act, 1920, does not repeal the Act of 1877, and the husband's liability as limited by that Act still remains.

1690. Any debt contracted by a woman before her marriage is an ante-nuptial debt, although it may not become prestable till after the marriage. Accordingly a wife's natural obligations to aliment her indigent parents,⁴ her children by a former husband,⁵ or an illegitimate child born before the marriage, are ante-nuptial debts.⁶ Her obligations as an heir, a vitious intromitter, an executrix, or a trustee contracted before her marriage,⁷ her obligation as a contributory in the liquidation of a company in which she held shares at marriage,⁸ her liability for a call made before marriage, are ante-nuptial debts. So also is her liability incurred before marriage for damages for non-performance of contract.⁹ Where before her marriage her father was dead or she was not living in his house, ordinary furnishings made to her will be presumed to have been made on her credit, and her liability for them will be among her ante-nuptial debts if they were unpaid at her marriage.¹⁰ But if she was living with her father, ordinary clothes or similar necessities are presumed to have been furnished to her on her father's credit, and unless this presumption was rebutted she was not liable for them.¹¹ Where it appeared that the wife's wedding clothes were furnished on

¹ *Wilkie v. Stewart*, 1678, Mor. 5876; *Weir v. Parkhill*, 1738, Mor. 5857; *Robertson v. Lyon*, 1821, 1 S. 48; *Fraser, H. & W. i.* 600.

² Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29), s. 4.

³ See *Cunningham v. Dalmahoy*, 1662, Mor. 5870; *Fraser, H. & W. i.* 599 and ii. 985.

⁴ *M'Allan v. Alexander*, 1888, 15 R. 863; *Reid v. Moir*, 1866, 4 M. 1060; *Foulis v. Fairbairn*, 1887, 14 R. 1088.

⁵ See *Ewing v. Adamson & Craig*, 1865, 3 M. 575; *Reid, supra*.

⁶ *Aitken v. Anderson*, 1815, Hume 217.

⁷ *Knows v. Kneeland*, 1627, Mor. 5862; *Dumbar v. Fraser*, 1663, Mor. 2367; *Burnet v. Lepers*, 1665, Mor. 5863; *Palmer v. Wakefield*, 1840, Beav. 227; and see *Pattison v. M'Vicar*, 1886, 13 R. 550.

⁸ *Wishart v. City of Glasgow Bank*, 1878, 6 R. 823.

⁹ *Fraser, H. & W. i.* 590.

¹⁰ *Hopewell v. Daes*, 1698, Mor. 13426 and 12482; *Fraser, H. & W., loc. cit.*

¹¹ *Bannatyne v. Clerk*, 1768, Mor. 5860; *Bell, Com. i.* 675.

the credit of the husband, as *e.g.* where her father was in prison for debt, the husband was found liable for them as for ante-nuptial debts; and also on the ground that they were *in rem versum* of him.¹

(ii) *Liabilities as Shareholder.*

1691. At common law shares owned by a woman passed on her marriage to her husband in virtue of the *jus mariti*, except where that right had been excluded. The husband alone was liable as a contributory, whether or not the wife's name remained on the register.² But where the *jus mariti* is excluded, as it now is since 1881, the husband of a woman shareholder is under no liability in respect of shares owned by her. The Act of 1881 applies to all shares owned by a woman married after 18th July 1881, and also, under the exception after noted, to all shares acquired by a married woman after that date, whether the marriage be before or after the Act. It also applies to property of a wife to which the operation of the 1881 Act has been extended by mutual deed.³ Sec. 78 of the Companies Act, 1862,⁴ under which on the marriage of a female shareholder her husband became liable as a contributory in the winding-up of the company, has now been superseded by s. 128 of the Companies (Consolidation) Act, 1908.⁵ Under this section the husband of a female contributory married before 18th July 1881 is, during the continuance of the marriage, liable as a contributory as respects any liability attaching to shares acquired by his wife before that date. This liability is not affected by the Married Women's Property Act, 1920.⁶ A husband, however, has now no liability for his wife's shares, except where the marriage was before 18th July 1881, and (a) the shares were acquired before the marriage, or (b) he had before the passing of the 1881 Act made by irrevocable deed provision for his wife in the event of his surviving her.

(iii) *Heritable Debts.*

1692. For the wife's heritable debts contracted before marriage the husband was not liable, except *in quantum lucratus* by the marriage.⁷ He was liable for her heritable as well as her moveable debts when her whole estate had been conveyed to him *per aversionem*. For such a conveyance must be understood to be made *deductis debitis*.⁸

¹ *Henderson v. Lafreis*, 1696, Mor. 5881; *Neilson v. Guthrie & Gavin*, 1672, Mor. 5878; see *Alston v. Stanfields*, 1682, Mor. 6007.

² *Thomas v. City of Glasgow Bank*, 1879, 6 R. 607; *Steedman v. City of Glasgow Bank*, 1879, 7 R. 111; *Carmichael v. City of Glasgow Bank*, 1879, 7 R. 118; *Wright's Exrs. v. City of Glasgow Bank*, 1880, 7 R. 527.

³ 44 & 45 Vict. c. 21, s. 4.

⁴ 25 & 26 Vict. c. 89.

⁵ 8 Edw. VII. c. 69.

⁶ 10 & 11 Geo. V. c. 64.

⁷ *Ersk.* i. 6, 17 and 18; *Bell, Com.* i. 675; *Fraser, H. & W.* i. 597; *Leslie v. Wallace*, 1708, Mor. 5853.

⁸ *Dick v. Cassie*, 1738, Mor. 5857; *Weir v. Parkhill*, 1738, Mor. 5857; *Bell's Prin.*, s. 1570; *Fraser, H. & W.* i. 599.

(iv) *Proof of Debts.*

1693. Where it is necessary to prove the constitution and resting owing of a debt of the wife by a reference to oath, this must be to the oath of the husband to fix him with liability.¹ The wife's oath will be effectual against her or her heirs after the dissolution of the marriage, and will affect her separate estate during its subsistence.² The husband's discharge in bankruptcy extinguishes his liability for his wife's ante-nuptial debts.³

(v) *Foreign Wife.*

1694. Where a man domiciled in Scotland marries a woman domiciled in another country the question what law determines his liability for her ante-nuptial debts is not free from difficulty. It is thought that where her estate remains separate, as in the case of a domiciled Scotsman marrying a foreigner after the Act of 1881, his liability will be limited by the Act of 1877.⁴

SUBSECTION (4).—*For Wife's Contracts.*(i) *Præpositura.*

1695. There is a presumption that a wife living in family with her husband is *præposita negotiis domesticis*.⁵ Her authority is not derived in any way from the fact of marriage, but from presumed agency as the natural manager of her husband's household. The same presumption may arise with regard to a daughter, sister, or other domestic manager.⁶ The wife's *præpositura* extends to the providing of necessities for her husband's family. Necessaries include food, clothing, medicine and medical attendance,⁷ furniture, and domestic servants. They must be such as are suitable to the husband's standard of living and material condition rather than to his rank and position in society.⁸ The presumption is one of fact, and may be rebutted by the husband.⁹ The fact that the wife has separate estate does not affect the presumption that as to proper necessities she is acting as the agent of her husband.¹⁰ Nor is the husband's liability affected by s. 3 of the Married Women's Property Act, 1920, which provides that the husband of a married

¹ *Monro v. Macleod*, 1809, Hume 215; see *Mitchell v. Moultrys*, 1882, 10 R. 378.

² *Anon.*, 1628, 1 Bro. Supp. 259; *Ker v. Covington*, 1627, Mor. 12478, 12489; Fraser, H. & W. i. 601.

³ *Miles v. Williams*, 1714, 1 P. Wms. 249, at p. 257; *Lockwood v. Salter*, 1833, 5 B. & Ad. 303; Fraser, H. & W. i. 595.

⁴ Fraser, H. & W. ii. 1321; Murray, Property of Married Persons, 58.

⁵ Ersk. i. 6, 26; Bell, Com. i. 479; Prin., s. 1565; Fraser, H. & W. i. 604.

⁶ *Hamilton v. Foster*, 1825, 3 S. 572.

⁷ *Kinfauns v. Kinfauns*, 1711, Mor. 5882.

⁸ *Kinfauns*, *supra*; *Buie v. Lady Gordon*, 1831, 9 S. 923.

⁹ *Debenham v. Mellon*, 1880, 6 App. Cas. 24.

¹⁰ *Mitchelson v. Lady Cranston*, 1780, Mor. 5886; *Davidson v. Wood*, 1863, 1 De G. J. & S. 465; *Robertson v. Haldane*, 1801, Hume 208.

woman shall not be liable in respect of any contract she may enter into or obligation she may incur on her own behalf.

1696. The wife has no authority in virtue of her *præpositura* to borrow money;¹ but where a wife borrowed money to take a journey rendered necessary by her health, her husband was found liable in repayment.² She is not empowered to grant or assign bills,³ nor to uplift debts due to her husband;⁴ nor to receive or discharge yearly duties;⁵ nor to grant or accept leases or receive notice to quit premises let to her husband;⁶ nor to pawn her husband's goods.⁷ If the wife borrows money for the purpose of providing for the family by authority of her husband, or if he homologates her act, as the money is *in rem versum* of him, he is liable to repay.⁸ Advances made to the husband and wife for the maintenance of the family are presumed to be made on the husband's account only.⁹ If a wife buys goods suitable for house furnishing, but never so applies them and the family gets no benefit from them, the husband is not liable therefor.¹⁰

1697. In two old cases a husband was found liable even when he had supplied his wife with money to pay for necessities, and she had mis-spent it, and received goods on credit.¹¹ These cases are doubted by Lord Fraser, and it is thought that they are unsound. A husband may forbid his wife to pledge his credit, in which case he is not liable for her contracts, except to one with whom he has permitted a course of dealing and whom he has failed to notify he is not to give the wife credit in future.¹² It is thought that where the husband has impliedly revoked the wife's mandate by giving her an allowance the same result should follow.¹³ Except where there has been a course of dealing, it is immaterial whether the tradesman who supplies the wife was aware of the prohibition or the allowance or not.¹⁴ The husband's liability depends on whether in fact the wife had authority to pledge his credit, and if he has in fact withdrawn her mandate, either expressly or impliedly by giving her an allowance, it is thought that he will not be liable. So also if the goods are not necessities,¹⁵ or the wife is already sufficiently provided with such goods, the presumption of authority to

¹ *M'Intyre v. Graham*, 1795, Hume 203. ² *Kinfauns v. Kinfauns*, 1711, Mor. 5882.

³ *Forrest v. Earl of Sutherland*, 1749, Mor. 6019; *Binny v. Smith*, 1836, 14 S. 355; but see *Scott v. Yates*, 1800, Hume 207.

⁴ *Harris v. Buchanan*, 1680, Mor. 6016; *Howie v. Jackson*, 1888, 4 S.L. Rev. 320.

⁵ *Boyd v. Lord Airth*, 1582, Mor. 6013; *Pitarrow*, 1587, Mor. 6014.

⁶ *Lambert v. Smith*, 1864, 3 M. 43; *Slowey v. Robertson and Moir*, 1865, 4 M. 1.

⁷ *Tweddel v. Duncan*, 1841, 3 D. 998.

⁸ *Thomson v. Elder*, 1827, 6 S. 204; *Grant v. Baillie*, 1830, 8 S. 606; *M'Intyre*, *supra*.

⁹ *Sandilands v. Mercer*, 1833, 11 S. 665; *Macara v. Wilson*, 1848, 10 D. 707.

¹⁰ *London Clothing Co. v. Bremner*, 1886, 2 S.L. Rev. 116.

¹¹ *Dalling v. M'Kenzie*, 1675, Mor. 6005; *Alston v. Philip*, 1682, Mor. 6007; but see *contra Hamilton*, 1634, Mor. 6003; Fraser, H. & W. i. 608.

¹² *Jolly v. Rees*, 1864, 15 C.B. N.S. 628.

¹³ *Debenham v. Mellon*, 1880, 6 App. Cas. 24; *Morel & Co. v. Earl of Westmoreland*, [1904] A.C. 11.

¹⁴ *Jolly v. Rees*, *supra*; *Debenham v. Mellon*, *supra*.

¹⁵ *Taylor v. Brittan*, 1823, 1 C. & P. 16, note; *Binny v. Smith*, *supra*.

bind the husband will be displaced.¹ It has been suggested in England that an exception may require to be made as regards articles of daily consumption such as bread or meat. In working-class neighbourhoods, where the practice of butcher and baker is to supply not for ready money but on short-term credit, it would seem to be unjust that a husband should escape liability for household supplies by proving that he had forbidden his wife to buy on credit.²

1698. So long as the wife acts within the limit of her *præpositura* she incurs no financial liability, but binds her husband alone.³ And this is so even although the husband should become bankrupt—unless she has given a promise to pay out of her own funds⁴ or it is shown that the goods were furnished upon her credit alone.⁵ The wife's *præpositura* may be determined by inhibition⁶ or by private notice to the tradesman.⁷ But these are effectual only in so far as she is provided for *aliunde*.⁸

(ii) *Proof of Constitution and Resting Owing.*

1699. Reference to the wife's oath, not as a witness but as a party, is competent to prove the constitution of the debt.⁹ As to its resting owing an opinion has been expressed¹⁰ that reference to the wife's oath would not suffice, but the contrary has been decided on the ground that "being *præposita* as to furnishing," she must also be *præposita* as to paying for these furnishings.¹¹

(iii) *Inhibition.*

1700. A husband may recall his wife's authority to pledge his credit by letters of inhibition, proceeding upon a bill obtained in the Bill Chamber in the same manner as an ordinary inhibition by a creditor.¹² The letters are served upon the wife by messenger-at-arms, and the inhibition is published by registration in the General Register of Inhibitions.¹³ No other publication is required. The inhibition prohibits the wife from contracting debt and the lieges from giving her credit to the prejudice of the husband. It is effectual to protect the husband,

¹ *Morgan v. Chetwynd*, 1865, 4 F. & F. 451; and see *Debenham v. Mellon*, 1880, 5 Q.B.D. 394, at p. 397.

² Per Bramwell L.J. in *Debenham v. Mellon*, *supra*.

³ *Aiton v. Lord Halkerton*, 1629, Mor. 5952; *Scougall v. Douglass*, 1630, Mor. 5953; *Houston v. Lady Laurieston*, 1630, Mor. 5954.

⁴ *Thomson v. Elder*, 1827, 6 S. 209.

⁵ *Gairns v. Arthur*, 1667, Mor. 5954.

⁶ See para. 1698, *infra*.

⁷ *Buie v. Gordon*, 1827, 5 S. 466.

⁸ *Auchinleck v. Earl of Monteith*, 1675, Mor. 5879; *Campbell v. The Laird of Ebdon*, 1676, Mor. 5879; *Lauder v. Chalmers*, 1685, Mor. 12481; *Buie*, *supra*.

⁹ *Dalling v. M'Kenzie*, 1675, Mor. 12480; *Barclay v. Binnie*, 1630, Mor. 12479; *Paterson v. Taylor*, 1771, Mor. 12485; *Cochran v. Lyle*, 1740, Mor. 6018.

¹⁰ Per Lord Young in *Mitchell v. Moultrys*, 1882, 10 R. 378; and see *Paterson v. Taylor* (n.d.), 5 Bro. Supp. 474.

¹¹ *Young, Trotter & Co. v. Playfair*, 1802, Mor. 12486.

¹² For style see *Fraser, H. & W.* ii. 1555; *Jur. Styles*, ii. 280.

¹³ 31 & 32 Vict. c. 64, s. 16.

although unknown to the tradesman,¹ but will not prevent the husband from being liable if he has failed to provide his wife with necessaries.² The onus of shewing that he has so provided her lies upon him.³ The husband may be held barred from founding on the inhibition if he have expressly or tacitly sanctioned his wife's pledging his credit thereafter.⁴

SUBSECTION (5).—*For Wife's Delicts and Quasi-Delicts.*

1701. A husband is liable for *quasi-delicts* committed by his wife in the course of acting in those things over which her *præpositura* extends,⁵ but not otherwise.⁶ He is not liable for slander committed by her,⁷ unless he has made himself a party to the slander by authorising it or otherwise identifying himself with his wife's act.⁸

SECTION 5.—STATUS OF WIFE.

1702. At common law a wife had no legal *persona*. "Her person is in some sort sunk by the marriage, so that she cannot act by or for herself."⁹ Her duty is to love and obey her husband, who is the head of the family. She is bound to obey her husband in his choice of the family home, and she cannot by voluntary agreement give up the right inherent in him to control the bringing up of his children.¹⁰ A wife takes by law her husband's nationality and domicile. But if during marriage her husband ceases to be a British subject she may, by making a statutory declaration, retain her British nationality.¹¹ If her husband has become British by naturalisation, revocation of his certificate does not affect her British nationality unless the revocation expressly so directs. If she was British by birth she cannot be denationalised except upon grounds personal to herself which would, if she had held a certificate, have justified its revocation, but she may make a statutory declaration of alienage within six months of the revocation of her husband's certificate.¹²

1703. At common law a wife was under the curatory of her husband, even if she were major and he a minor. Accordingly her personal

¹ *Topham v. Marshall*, 1808, Mor. App., "Inhibition," No. 2; Ersk. i. 6, 26; Fraser, H. & W. i. 633.

² Ersk., Fraser, *loc. cit.*; *Gordon v. Sempill*, 1776, Mor. App., "Husband and Wife," No. 4; and cases in note 10, para. 1695, *supra*.

³ *Topham, supra*.

⁴ *Ker v. Gibson*, 1709, Mor. 6023.

⁵ *Ludquharn v. Earl Marischal*, 1590, Mor. 13982.

⁶ *Scot v. Weill*, 1628, Mor. 6015; *Mullen v. White*, 1881, 18 S.L.R. 493.

⁷ *Martin v. Murray*, 1803, Hume 619; *Barr v. Neilsons*, 1868, 6 M. 651; *Milne v. Smiths*, 1892, 25 R. 95.

⁸ *Scorgie v. Hunter*, 1872, 9 S.L.R. 292.

⁹ Ersk. i. 6, 19.

¹⁰ *Vansittart v. Vansittart*, 1858, 27 L.J. Ch. 289; *Colquhoun v. Colquhoun*, 1804, Mor. App. 1, "Husband and Wife," No. 5.

¹¹ 4 & 5 Geo. V. c. 17, ss. 2, 10, 11.

¹² 8 & 9 Geo. V. c. 38, s. 1.

obligations were null.¹ The husband's curatory was an office *sui generis*, and differed in important particulars from the curatory of a minor, not the least important of the differences being that the husband's consent was ineffectual to validate the wife's personal obligations.² She could not herself be a tutor or curator,³ but she might with his consent act as an executrix or a trustee.⁴ If she had been a trustee prior to the marriage the husband's consent to her continuing to act was presumed, unless he intimated to the contrary. If he did so she ceased to be a trustee.⁵ When the husband consented to the wife acting he became liable for her obligations if she had no separate estate, but apparently it was not necessary for him to authorise expressly every act of administration.⁶ She might act as tutor to her children by a former marriage.⁷ As a result of the Married Women's Property Act, 1920, the husband's curatory of his wife is now abolished, except where and only so long as she is in minority,⁸ and she may contract as if she were unmarried.⁹ A wife who has attained majority is therefore now completely *sui juris*, and is independent of her husband both as regards her property and her personal capacity. It is thought, however, that the Act has not altered the fundamental relations of husband and wife so as to enable either to sue the other in a civil action for personal wrong.¹⁰

SECTION 6.—CAPACITY OF A WIFE.

SUBSECTION (1).—General Common Law Rules.

1704. As has been already seen, by the common law of Scotland the legal *persona* of a wife was so merged in that of her husband as to leave her incapable of independent legal action.¹¹ The husband was the wife's curator, and all obligations undertaken and deeds granted by her required his consent and concurrence unless they dealt with her separate estate, from which the *jus mariti* and right of administration were excluded, or unless they were in the husband's own favour.¹² Even when in security of the husband's debts or in favour of his relations, the wife's deeds required his consent.¹³ She might with his consent

¹ Fraser, H. & W. i. 523 *et seq.*; *Jackson v. McDiarmid*, 1892, 19 R. 528; *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470; *McLean v. Angus Bros.*, 1887, 14 R. 448; *Galbraith v. Provident Bank*, 1900, 2 F. 1148.

² Ersk. i. 6, 23; Fraser, H. & W. i. 515.

³ Fraser, *Guardian and Ward*, 3rd ed., pp. 407 and 480.

⁴ *Watson v. Darling*, 1825, 1 W. & S., 188; *Pattison v. M'Vicar*, 1886, 13 R. 550.

⁵ *Hill v. City of Glasgow Bank*, 1879, 7 R. 68.

⁶ *Pattison*, *supra*; *Hill*, *supra*; Fraser, H. & W. i. 814.

⁷ 49 & 50 Vict. c. 27; *Campbell v. Maquay*, 1888, 15 R. 784.

⁸ 10 & 11 Geo. V. c. 64, s. 2.

⁹ *Ibid.*, s. 3 (1).

¹⁰ See *Young v. Young*, 1903, 5 F. 350.

¹¹ Ersk. i. 6, 19; Bell's Prin., 1609; Fraser, H. & W. i. 507.

¹² *Rennie v. Ritchie*, 1845, 4 Bell's App. 221; *Dickson v. Blair*, 1871, 10 M. 41.

¹³ Bell's Prin., s. 1061; *Rennie*, *supra*; *Brownlee v. Waddell*, 1831, 10 S. 39.

convey her property¹ or assign a *spes successionis*² in favour of his creditors, but she could not undertake a cautionary obligation in his favour, for that is a personal obligation. The wife's personal obligations could not be rendered valid even by the husband's consent, and this did not arise from any privilege attaching to the married state of the wife, but from an absolute disability to bind herself personally with or without the consent of her husband.³

1705. Where the husband's rights were entirely excluded the wife might deal with her separate estate as if unmarried, and might render her estate liable for the fulfilment of obligations connected with its enjoyment or administration.⁴ With regard to estate in this position she had a title to sue without her husband's concurrence.⁵ But the possession of separate estate did not remove her incapacity as a married woman to contract a personal obligation as distinct from an obligation which bound her estate but not herself. Except when she had a protection order,⁶ or was judicially separated, or in the special cases afterwards referred to, a married woman could not bind herself. Her possession of separate estate did not enable her to grant a bill of exchange or a promissory note, as cautioner for a debt,⁷ or a cash credit bond.⁸ And a discharge of legitim signed without her husband's consent was not binding.⁹ But where the right of administration was excluded she might invest or spend her moveable estate in all respects as an unmarried woman.¹⁰ As to her heritage when this right was excluded, she might dispose of it or grant leases or feus, or burden it, and in short deal with it as if she were unmarried.¹¹

1706. The *jus mariti* of the husband might be excluded, but not his right of administration. This was formerly an unusual case, the rule being either to exclude the husband's rights altogether or not at all. The effect of the Married Women's Property Act, 1881,¹² was to make it, where there was no marriage contract, the normal position of a wife's heritable estate and of the capital of her moveable estate, thus a married woman could not deal with her estate without her husband's consent.

¹ *Eleis v. Keith*, 1665, Mor. 5987; *Marshall v. Ferguson*, 1683, Mor. 5990.

² *Coats v. Bannochie's Trs.*, 1912 S.C. 329; *Reliance Mutual Life Assurance Co. v. Halkett's Factor*, 1891, 18 R. 615.

³ *Fraser, H. & W. i. 520*; *Biggart v. City of Glasgow Bank*, 1829, 6 R. 470.

⁴ *Burnett v. British Linen Co.*, 1888, 25 S.L.R. 356; *Henderson v. Dawson*, 1895, 22 R. 895; *Biggart, supra*; *Fraser, H. & W. i. 813*.

⁵ *Graham v. Hunter's Trs.*, 1831, 9 S. 543; *Hay Primrose, Petr.*, 1850, 12 D. 916.

⁶ See para. 1722, *infra*.

⁷ *M'Lean v. Angus Bros.*, 1887, 14 R. 448; see *Galbraith v. Provident Bank*, 1900, 2 F. 1148; *Davis v. Murray* (O.H.), 1898, 6 S.L.T. 106.

⁸ *Jackson v. M'Diarmid*, 1892, 19 R. 528; see *Astley's Exr. v. Murray's Tr.* (O.H.), 1901, 9 S.L.T. 18.

⁹ *Miller v. Galbraith's Trs.*, 1886, 13 R. 764.

¹⁰ *Biggart, supra*; *Henderson, supra*; *Laing v. Provincial Homes Investment Co.*, 1909, S.C. 821.

¹¹ *Annand and Colquhoun v. Scott*, 1775, 2 Pat. 369; *Keggie v. Christie*, 25th May 1815, F.C.; *Gowan v. Pursell*, 1822, 1 S. 418; *Gordon v. Gordons*, 1832, 11 S. 36; *Standard Property Investment Co. v. Cowe*, 1877, 4 R. 695, per Lord Gifford.

¹² 44 & 45 Vict. c. 21.

It was not his, but he had the right of directing how it should be administered, subject to the condition that he had to do so for her behoof, and not for his personal advantage as opposed to hers.¹ Transfers of her shares and similar documents had to be signed by both spouses.² She could not purchase an annuity without his consent.³ She could not sue or defend without his concurrence.⁴ Where the action related to income of heritage in Scotland she might sue alone, as the right of administration was there excluded. It would seem that the wife could grant a valid receipt to tenants for rents, but otherwise the 1881 Act gave her no power, and she had none at common law to sell or burden or otherwise deal with her heritage.⁵ She was not expressly prohibited from assigning her rents in advance, as she was in the case of the prospective income of her moveables. But it would appear that she could not without her husband's consent grant a lease or perform any other act of administration.⁶

1707. The wife's incapacity being an absolute disability at law her property could not be attached in consequence of a personal obligation, even if she possessed the property exclusive of the *jus mariti* and right of administration of her husband, and could assign or dispense it without his consent. And even in the exceptional cases to be noted below, where the wife's personal obligation did found diligence against her separate estate, her person could seldom be attached. After dissolution of the marriage the wife might ratify or homologate a personal obligation, but the effect was to make a new contract, not to set up the old, which was null.⁷

SUBSECTION (2).—*Exceptions.*

1708. To the general rule that a married woman's personal obligations were null there were important exceptions at common law, and modern legislation modified and, as we have seen, ultimately abolished the doctrine. The common law exceptions are detailed below. The statutory modifications have been already noticed in connection with the husband's *jus mariti* and right of administration,⁸ and are more fully examined hereafter.⁹ The only other statutory provision which need be noticed in this connection is the Married Women's Policies of Assurance (Scotland) Act, 1880,¹⁰ which provided that a married woman might effect a policy of assurance on her own life or on the life of her husband for her separate use, which should vest in her exclusive of the *jus mariti* and right of administration of her husband, and be assignable either *inter vivos* or *mortis causa* without his consent. This statute is noticed in more detail below.¹¹ So far as it conferred special powers

¹ *Bryce's Tr.*, 1878, 5 R. 722. ² See *Adam v. Johnson* (O.H.), 1920, 2 S.L.T. 328.

³ *Dick v. The General Life Assurance Co.* (O.H.), 1900, 7 S.L.T. 446.

⁴ *Borthwick v. Urquhart*, 1827, 5 S. 242; *Wight v. Dewar*, 1827, 5 S. 549.

⁵ *Boyle v. Crawford*, 1822, 1 S. 372 (N.E. 350); *Bullions v. Bayne*, 1793, Mor. 6149.

⁶ Ersk. i. 6, 27; Fraser, H. & W. i. 804; Rankine on Leases, p. 23.

⁷ Fraser, H. & W. i. 1723.

⁹ See para. 1723 *et seq.*, *infra*. ¹⁰ 43 & 44 Vict. c. 26.

⁸ See para. 1680, *supra*.

¹¹ See para. 1726, *infra*.

upon a married woman, it is now superseded by the Married Women's Property Act, 1920,¹ which gives her power to contract as if unmarried.

1709. At common law a wife's personal obligation was valid (1) where it was *de in rem verso* of herself;² (2) where it was an obligation *ad factum præstandum*; (3) where she was living apart from her husband in circumstances which negatived the idea of her having a mandate from him; (4) where the husband was imprisoned or civilly dead; and possibly (5) where she fraudulently held herself out as unmarried.³

(i) *Obligations in rem versum of Wife.*

1710. If the husband was alive, furnishings for his wife and family were strictly *in rem versum* of him, but the furnishings must be suitable to his income, otherwise he was not liable if they had been supplied to the order and for the use of the wife.⁴ Debts incurred in the management of the wife's separate property, or to clear away burdens from it, were *in rem versum* of her; and on the same principle the expenses of recovering her separate estate were a good debt against a married woman.⁵ When a married woman possessed estate exclusive of the *jus mariti* and right of administration of her husband, she might, with her husband's consent, engage in trade with it, and thereby incur personal obligations—as on bills or promissory notes—which would be effectual against her separate estate.⁶ Thus she might invest it in the shares of a company, and she was liable to the extent of her separate estate upon the liquidation of the company.⁷ It was not necessary that a married woman should actually profit by an obligation, to make it binding upon her; if the obligation were undertaken with the intention of benefiting her separate estate it was binding on her although benefit did not result.⁸ Professor Bell was of opinion⁹ that a bond by a married woman to take effect after her death was good, but this doctrine has been seriously questioned.¹⁰ A married woman, however, was free to dispose of both her heritable and her moveable estate by *mortis causa* deed.

(ii) *Obligations ad factum præstandum.*

1711. Personal diligence might be used against a married woman to compel the performance of what was in her own power and could not be validly performed by anyone else.¹¹ "Where the act to be performed is something in which the obligant's work alone is concerned—

¹ 10 & 11 Geo. V. c. 64.

² *Harvey v. Chessels*, 1791, 1 Bell's Oct. Cases 255, at p. 258, per Lord Justice-Clerk M^cQueen.

³ *Fraser, H. & W. i.* 555.

⁴ *Ibid.*, i. 540; *Buie v. Lady Gordon*, 1831, 9 S. 923.

⁵ *Fraser, H. & W. i.* 537; *Brown v. Grahame*, 1830, 8 S. 834.

⁶ *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470; *Henderson v. Dawson*, 1895, 22 R. 895.

⁷ *Biggart, supra*; *M^cDougall v. City of Glasgow Bank*, 1879, 6 R. 1089.

⁸ *Henderson, supra*.

⁹ Bell's Prin., s. 1613.

¹⁰ *Miller v. Milne's Trs.*, 1859, 21 D. 377.

¹¹ Ersk. i. 6, 19.

quae in nudis finibus faciendi consistunt," e.g. to sing at a concert or act in a play, "then specific performance will not be enforced, but damages alone will be given. But if it include anything more than this—e.g. where delivery of a stipulated article is to be made, or anything analogous to delivery, such as the execution of a deed—the creditor may enforce specific implement so far as that can be indirectly enforced by imprisonment."¹

(iii) *Wife Living Separate.*

1712. If the husband were abroad or the wife living separate from him in circumstances which did not entitle her to pledge his credit—e.g. when she was in desertion, or was supplied with adequate aliment by him²—her estate was liable for her personal obligations, even for necessities. Further, if a woman's husband were abroad and she engaged in business or trade, obligations in relation to her business might be enforced not only against her estate but against her person—the latter liability marking the difference between this case and that of a wife who was a trader, but not separated from her husband. Thus a married woman whose husband resided in England, and who carried on business on her own account in Scotland, was held liable to personal diligence on a bill she had accepted, although not in the course of her trade.³

(iv) *Husband Imprisoned or Civilly Dead.*

1713. If the husband were imprisoned or in penal servitude, at least if it were for a long term, the wife's disability was removed.⁴ And it was the same if he were civilly dead. No precise meaning seems to have been attached to this phrase either in Scotland or in England; but a wife's obligations were binding if, for instance, her husband had fled from trial for a crime.⁵ Insanity of the husband did not affect a married woman's incapacity as to personal obligations.

(v) *Married Woman fraudulently holding Herself out as Unmarried.*

1714. "If a woman assert herself to be unmarried and so induce any person to enter into a contract with her, the other party may insist on the contract being implemented, and may use diligence on the wife's obligation."⁶ There must be actual fraud; in a case where a woman granted a promissory note in her maiden name, under which she carried on business, and the debt had no connection with the business, the Court, holding that there was only innocent misrepresentation, found that she was not liable.⁷

¹ Fraser, H. & W. i. 555.

² *Robins v. Countess of Southesk*, 1688, Mor. 5955.

³ *Orme v. Diffors*, 1833, 12 S. 149; following *Churnside v. Currie*, 1789, Mor. 6082.

⁴ Fraser, H. & W. i. 546; *Anderson v. Shand*, 1833, 11 S. 688; *Farquhar v. Lord Advocate*, 1753, Mor. 4669.

⁵ Fraser, H. & W. i. 546.

⁶ Fraser, H. & W. i. 544; and see Bankt. i. 5, 74.

⁷ *Galbraith v. Provident Bank*, 1900, 2 F. 1148.

SUBSECTION (3).—*Wife as a Partner or Shareholder.*

1715. At common law the marriage of a female partner dissolved the firm. "The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the firm without her husband, and she cannot bring him in."¹ A married woman could not carry on a separate business of any kind without her husband's consent,² and the same was true of her becoming a partner. Even if the husband did consent, the wife's separate estate alone was liable, and he incurred no personal responsibility. A wife with separate estate could not enter into a trading partnership with her husband.³ These disabilities are now removed by the Married Women's Property (Scotland) Act, 1920,⁴ which conferred upon a married woman full contractual capacity as if she were unmarried.

1716. In accordance with the common law rule that marriage operated as a universal assignation to the husband of the wife's moveable estate, shares in a joint stock company passed to him, and he alone became liable on account of them, the wife being considered as merely the husband's agent.⁵ But if a married woman possessed or was bequeathed shares which were excluded from the *jus mariti* either by convention or by the operation of statute, she continued to be a shareholder and alone liable on the shares.⁶ Separate estate might be invested by a wife in shares even against her husband's wish⁷ if it were estate from which the right of administration as well as the *jus mariti* was excluded. The present position of the husband in relation to his wife's shares has been discussed above.⁸

SUBSECTION (4).—*Wife as Pursuer or Defender.*

1717. At common law a married woman could not by herself sue or defend any action even relating to her separate property (from which the *jus mariti* and right of administration were not excluded), her rights, or her injuries.⁹ But the rule was subject to much the same exceptions as have been dealt with in considering a married woman's capacity in other directions. Thus, where a wife was living apart from

¹ *Russell v. Russell*, 1874, 2 R. 94.

² *Ferguson's Tr. v. Willis, Nelson & Co.*, 1883, 11 R. 261, at p. 268.

³ *Macara v. Wilson*, 1848, 10 D. 707; *Fraser, H. & W. i. 513.*

⁴ 10 & 11 Geo. V. c. 64.

⁵ *Thomas v. City of Glasgow Bank*, 1879, 6 R. 607; *Steedman v. City of Glasgow Bank*, 1879, 7 R. 111; *Carmichael v. City of Glasgow Bank*, 1879, 7 R. 118.

⁶ *Forbes v. City of Glasgow Bank*, 1879, 6 R. 1122; *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470.

⁷ *Biggart, supra*; *Laing v. Provincial Homes Investment Co.*, 1909 S.C. 812.

⁸ See para. 1690 above.

⁹ *Bell's Prin.*, s. 1610; *Fraser, H. & W. i. 566*; *Maclaren, Court of Session Practice*, p. 178.

her husband and he refused to concur, she was held entitled to sue without him an action of damages for slander.¹ And a wife was allowed to sue without her husband when he had an adverse interest; when he had gone abroad and not been heard of for some years;² when he had been transported;³ and when he had unreasonably refused his consent.⁴ After the 1881 Act a married woman might appear in actions relating to the income of her personal estate or the annual produce of her heritage without her husband's consent or concurrence; and even where the Act did not apply, the same was the rule if the action were connected with separate estate from which the *jus mariti* and right of administration were excluded.⁵ Since 1920 a married woman may sue and be sued as if she were unmarried.

SUBSECTION (5).—*Judicial Ratification.*

1718. From an early period it has been the practice for a married woman to ratify judicially deeds granted by her, so as to avoid question of their having been granted under the compulsion of her husband.⁶ The wife appeared before a justice of the peace and declared on oath that the deed was freely granted by her. The declaration was usually endorsed upon the deed to be ratified, but might be separate. It had to be made in the absence of the husband, and must so state.⁷ Ratification was not essential to the validity of a wife's deed.⁸ It barred challenge on the ground of undue influence by the husband only, and did not exclude any other ground of challenge which was open to a person *sui juris*, such as fraud, force, or essential error.⁹ Opinions have differed as to whether it was open to a wife to plead that the ratification itself was extorted by force or fear.¹⁰ As a married woman is now *sui juris* no reason now exists for judicial ratification of her deeds, except possibly deeds granted by her in favour of her husband.

SECTION 7.—RIGHTS OF WIFE IN HER SEPARATE ESTATE.

SUBSECTION (1).—*Introductory.*

1719. This subject has been already treated at length in considering the capacity of a married woman. Since the passing of the Married Women's Property Act, 1920, it is of diminishing interest. There are, however, certain special forms of property which fall to be noticed,

¹ *Cullen v. Ewing*, 1830, 6 W. & S. 566; and see *Smith v. Stoddart*, 1850, 12 D. 1185.

² *M'Quillan v. Smith*, 1892, 19 R. 375.

³ *Paul v. Gibson*, 1834, 7 W. & S. 462.

⁴ *Blair v. Burns*, 1829, 8 S. 265; *Cullen, supra*.

⁵ *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470.

⁶ Act 1481, c. 83.

⁷ Ersk. i. 6, 33.

⁸ *Buchan v. Risk*, 1834, 12 S. 511; *Standard Property Co. v. Cowe*, 1877, 4 R. 695, per Lord Justice-Clerk Moncreiff at p. 702.

⁹ Ersk. i. 6, 35; *Fraser, H. & W. i. 823*.

¹⁰ See Ersk. i. 6, 34; Menzies, *Convey.*, p. 41; Bell, *Com. i. 135*; Craig, *Jus Feudale*, ii. 22, 16; *M'Neill v. Steel's Trs.*, 1829, 8 S. 210; *Fraser, H. & W. i. 822*; Bell, *Com. i. 143*; *Grant v. Coats' Tr.* 1642, Mor. 16483.

although the importance of these is now small in view of the removal of all limitation upon the wife's right to and control of her own property.

SUBSECTION (2).—*Paraphernalia*.

1720. This term properly denotes the property of the wife which is over and above the *dos* or *φερνή*. In the Roman law the husband enjoyed the fruits of the *dos* during the marriage. The rest of the wife's estate remained her own property, and was called her *paraphernalia*.¹ In Scots law by a somewhat loose analogy the expression was borrowed to describe that portion of the wife's estate which did not fall under the *jus mariti*. The *paraphernalia* included the wife's clothes and ornaments peculiar to her person and not suitable for a man's use, such as necklaces, bracelets, and the like.² By a slight extension, repositories such as cabinets and wardrobes specially destined and appropriated for holding the wife's clothing or ornaments were included *inter paraphernalia*.³ Articles of this limited class as strictly personal to the wife were said to be paraphernal *ex sua natura*. It was immaterial from what source the wife acquired them.⁴ Even if presented by the husband during the marriage they were not revocable as were other donations.⁵ But the presumption that they were really gifted might be rebutted, as when it was shewn that a jewel which a wife possessed was an heirloom,⁶ or that the husband, being a merchant, allowed his wife to wear diamonds which formed part of his stock without intending them to become her property.⁷ A lady's dressing-plate or tea-plate are not paraphernal.⁸

1721. Articles not strictly paraphernal because suitable for the use of either sex, but of a character closely allied to proper *paraphernalia*, e.g. a watch or a ring, were reckoned *inter paraphernalia* if presented to the wife before or on the day of the marriage. But on the dissolution of the marriage they became again ordinary moveables, and if the wife entered into a second marriage must be presented anew if they were to reacquire their paraphernal quality.⁹ Articles of this class, not being paraphernal by nature, might be presented by the husband to the wife during the marriage. In that case the gifts were revocable by him *stante matrimonio*, but not after the wife's death.¹⁰ *Paraphernalia* were not excluded from the husband's right of administration. Accordingly a wife could not dispose of them *inter vivos* or pledge them without her husband's consent.¹¹ She might test upon them;¹² and if she died

¹ Dig., 23, 3, 9; Code, 5, 14, 8.

² *Dicks v. Massie*, 1695, Mor. 5821.

³ *Pitcairn v. Peutherer*, 1716, Mor. 5825; *Cameron v. M'Lean*, 1870, 13 S.L.R. 278, correcting *Dicks* on this point.

⁴ *Black v. Wood*, 1803, Hume 210; *Cameron, supra*; Fraser, H. & W. ii. 775.

⁵ Ersk. i. 6, 15; Fraser, *loc. cit.*

⁶ *Earl of Leven v. Montgomery*, 1683, Mor. 5803.

⁷ *Dicks, supra*; *Craig v. Monteith*, 1684, Mor. 5819.

⁸ *Wigton v. Fleming*, 1748; Elch., voce "Husband and Wife," No. 30; Mor. 5771; *Gemmil v. Yule*, 1735, Mor. 5997.

⁹ Ersk. i. 6, 15; *Dicks, supra*.

¹⁰ *Dicks v. Massie, supra*.

¹¹ *Anon.*, 1754, 5 Bro. Sup. 811; *Gemmil v. Yule, supra*; but see Fraser, H. & W. i. 806.

¹² *Young v. Johnson and Wright*, 1880, 7 R. 1760.

intestate they descended to her next-of-kin.¹ Articles of household furniture given to a wife by her friends before the marriage were not paraphernal.²

1722. After the Married Women's Property Act, 1881, the wife's moveable estate no longer fell under the *jus mariti*. The law of *paraphernalia* became therefore of slight importance in marriages after the commencement of that Act. It would still apply to jewels or other things properly paraphernal, presented to the wife by the husband during the marriage.³ Although by the Married Women's Property Act, 1920, donations between husband and wife were made irrevocable, an exception is made of donations completed within a year and day before the sequestration of the estates of the donor under the Bankruptcy Acts. The question therefore might still arise as to whether a particular gift by a husband to his wife was revocable or was irrevocable because paraphernal.

SUBSECTION (3).—*Rights under Protection Order.*

1723. Under the Conjugal Rights (Scotland) Amendment Act, 1861,⁴ a wife deserted by her husband without reasonable cause⁵ might apply by petition to the Lord Ordinary or to the Sheriff⁶ for an order to protect property which she had acquired or might acquire by her own industry after such desertion, and property which she had succeeded to or might succeed or acquire right to after such desertion. Such an order continued until recalled or until the parties returned to cohabitation. The order had the effect of a decree of separation in regard to the property rights and obligations of the husband and of the wife, and in regard to the wife's capacity to sue or be sued.⁷ It barred an action of adherence by the husband. Property which the wife acquired during the subsistence of the order remained vested in her as if unmarried, and her right thereto and the rights of any third parties acquired from or through her were not affected by the recall of the order. If a wife protected by such an order died intestate her estate went to her heirs. The statute of 1861 is not repealed by the later Married Women's Property Acts, but the Act of 1920 has finally removed the necessity for an application for a protection order, and the procedure under it is now practically obsolete.

SUBSECTION (4).—*Married Women's Property Acts.*

(1) *The 1877 Act.*

1724. Under the Married Women's Property (Scotland) Act, 1877,⁸ the husband's *jus mariti* and right of administration were excluded

¹ Ersk. i. 6, 41.

² *Sleigh v. Sleigh's Exr.*, 1901, 9 S.L.T. 22.

³ See *Turnbull*, 1864, 2 M. 402; and *Chalmers v. Chalmers*, 1868, 6 M. 547, as to whether this phrase meant something different from wilful and malicious desertion.

⁴ 37 & 38 Vict. c. 31.

⁵ 24 & 25 Vict. c. 86, s. 5.

⁶ 40 & 41 Vict. c. 29.

⁷ *Hewat v. Wood*, 1803, Hume 210.

⁸ 24 & 25 Vict. c. 86, ss. 1-3.

from the earnings of a married woman after 1st January 1878 in any business carried on under her own name, and from her gains made after that date through the exercise of any literary, artistic, or scientific skill. The investments of such wages, earnings, money, or property were deemed to be "settled to her sole and separate use," and her receipts therefor were a good discharge.

(ii) *The 1881 Act.*

1725. The Married Women's Property (Scotland) Act, 1881,¹ provided that where a marriage was contracted after the passing of the Act, and the husband had at the time of the marriage his domicile in Scotland, the whole moveable or personal estate of the wife whether acquired before or during the marriage should be vested in her as her separate estate, and should not be subject to the *jus mariti*. The Act did not, except to a very limited extent, exclude the husband's right of administration. The extent to which the latter right was limited by the Act has already been discussed, as have also the effects of the Act upon a wife's capacity to contract personal obligations and to deal with her heritable and moveable estate.²

(iii) *The 1920 Act.*

1726. The Married Women's Property (Scotland) Act, 1920,³ wholly abolished the husband's right of administration and gave a married woman the same powers over her heritable and moveable estate as if she were unmarried. She may now deal with her estates as she pleases, execute deeds and contracts without the husband's consent, sell or burden her estates or assign the income thereof, elect as between legal and conventional provisions, and sue and defend actions in her own name as if unmarried. Accordingly the former Married Women's Property Acts, though not repealed by this Act, are largely superseded or their provisions rendered superfluous by the complete emancipation of a married woman effected by the Act of 1920.

SUBSECTION (5).—*The Married Women's Policies of Assurance Act.*

1727. The Married Women's Policies of Assurance (Scotland) Act, 1880,⁴ extended to Scotland facilities for effecting policies of assurance for the benefit of married women and children conferred in England by the Married Women's Property Act, 1870.⁵ The Act gave power to a married woman to effect a policy on her own life or the life of her husband, and directed that the same, if expressed to be for her separate use, should vest in her, exclusive of her husband's rights, and should

¹ 44 & 45 Vict. c. 21.

² 10 & 11 Geo. V. c. 64.

³ 33 & 34 Vict. c. 93. See now the English Act of 1882 (45 & 46 Vict. c. 75),

s. 11.

⁴ See para. 1680, and para. 1706, *supra*.

⁵ 43 & 44 Vict. c. 26.

be assignable by her without his consent (s. 1). A policy effected by a married man on his own life, and expressed to be for the benefit of his wife or children, shall be a trust for the wife or children, and shall not be liable to the diligence of his creditors or moveable by him as a donation or reducible on any ground of excess or insolvency. But if it shall be proved that the policy was effected and premiums paid with intent to defraud creditors, or if the person on whose life the policy is effected shall be made bankrupt within two years of its date, creditors may claim repayment of the premiums so paid out of the proceeds of the policy (s. 2). This enactment in both its branches is now superseded by the provisions of the Married Women's Property (Scotland) Act, 1920, which abolishes the husband's curatory and makes donations between husband and wife irrevocable by the husband, or by his creditors if completed a year and a day before his sequestration.¹

1728. It has been held that a widower is a married man in the sense of s. 2.² A policy effected under that section for the benefit of the wife may be surrendered at any time by the trustee with the concurrence of the wife.³ But the wife cannot *stante matrimonio* assign, burden, or renounce her interest under the policy.⁴ No right vests in the wife or children unless there has been actual or constructive delivery of the policy.⁵ A policy may be effected under s. 2 by a married man not domiciled in Scotland.³ Where the policy is expressed to be for the benefit of wife and children it seems that the mother and the children would share equally.⁶ In England inconsistent views have been taken.⁷ Where a husband who had effected a policy on his life for the benefit of his wife was murdered by her, it was held in England that the insurance money formed part of his estate.⁸ In another English case it was held that the husband's creditors could not claim repayment of premiums on a policy settled by him on his wife and children when it was proved that the premiums had been paid by the wife out of her separate estate.⁹ It is to be observed that the Act gave no power to a married woman to effect a policy on her husband's life for his benefit or that of the children of the marriage. But she has now complete power to contract as if she were unmarried.¹⁰ A wife who is divorced forfeits her interest in the policy.¹¹

¹ 10 & 11 Geo. V. c. 64, ss. 2 and 5.

² *Kennedy's Trs. v. Sharpe*, 1895, 23 R. 146.

³ *Schumann v. Scottish Widows' Fund*, 1886, 13 R. 678.

⁴ *Scottish Life Assurance Co. v. John Donald, Ltd.*, 1901, 9 S.L.T. 200; *Barras v. Scottish Widows' Fund*, 1900, 2 F. 1094; *King v. Lucas*, 1883, 23 Ch. D. 712.

⁵ *Jarvie's Tr. v. Jarvie's Trs.*, 1887, 14 R. 411.

⁶ *Ibid.*, per Lord M'Laren (Ordinary).

⁷ *Adam's Policy Trusts*, 1883, 23 Ch. D. 525; *Mellor's Policy Trusts*, 1877, 6 Ch. D. 127; *In re Seyton*, 1887, 34 Ch. D. 511; *In re Davies Policy Trusts*, [1892] 1 Ch. 90; *In re Browne*, [1903] 1 Ch. 188.

⁸ *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147.

⁹ *Holt v. Everall*, 1876, 2 Ch. D. 266.

¹⁰ 10 & 11 Geo. V. c. 64.

¹¹ *Wallace v. Wallace* (O.H.), 1916, 1 S.L.T. 163.

SECTION 8.—RIGHTS OF WIFE IN HUSBAND'S ESTATE.

SUBSECTION (1).—*Right of Widow to Aliment and Mournings.*

1729. A widow is entitled, if otherwise unprovided for, to aliment out of her husband's estate so long as she lives. The claim is one of debt, but is postponed to that of other creditors.¹ The claim can only arise to a widow whose husband's estate is so invested as to yield her no right, or no sufficient right, to terce or *jus relictæ*. Prior to the Conveyancing (Scotland) Act, 1924,² this might happen if, for example, he left heritage in which he was not infeft, or personal bonds bearing interest, which were heritable as between husband and wife and yet yielded no right of terce. Now under s. 22 of that Act terce is due out of estate to which the husband had a personal title capable of being completed by infeftment, and under s. 24 such personal bonds are now to be included in computing *jus relictæ* in the same way as for legitim. In such cases the Court formerly gave such aliment,³ or additional aliment,⁴ as might seem expedient if need be out of capital.¹ A contingent claim for aliment by a widow will not prevent the distribution of the estate.⁵

1730. The claim may be barred by the acceptance of a provision in an ante-nuptial marriage contract, if that provision be sufficient to avoid indigence although small relatively to the husband's estate.⁶ The necessity for such application is now largely removed by the enactments of the Conveyancing (Scotland) Act, 1924, above referred to, and of the Intestate Husband's Estate (Scotland) Acts, 1911,⁷ under which a widow is now entitled to a provision out of her husband's estate irrespective of the character of his investments. But cases may still occur where this provision, or the amount of the *jus relictæ* and terce, is not large enough to exclude such a claim.

1731. A widow is entitled to mournings suitable to her husband's position in life. This is a privileged debt, preferable against ordinary creditors.⁸ She is also entitled to aliment from her husband's death till the first term when her provisions legal or conventional are payable. This claim does not rest upon necessity,⁹ and it is to be measured by the husband's position and not by the amount of her provisions.¹⁰ The

¹ *Lindsay's Crs. v. His Relict*, 1714, Mor. 11847.

² 14 & 15 Geo. V. c. 27.

³ *Lowther v. M'Laine*, 1786, Mor. 435; *Hobbs v. Baird*, 1845, 7 D. 492; *Lee v. Bates*, 1840, 3 D. 317.

⁴ *Thomson v. M'Culloch*, 1778, Mor. 434; *Hardie v. Hardie*, 1828, 6 S. 1144; *Anderson v. Grant*, 1899, 1 F. 484.

⁵ *Howard's Exr. v. Howard's Curator Bonis*, 1894, 21 R. 787.

⁶ *Countess Dowager of Seafield v. The Earl*, 8th February 1814, F.C.

⁷ 1 & 2 Geo. V. c. 10; see para. 1731, *infra*.

⁸ *Sheddan v. Gibson*, 1802, Mor. 11855; Bell, Com. ii. 157; Fraser, H. & W. ii. 968.

⁹ *Palmer v. Sinclair*, 27th June 1811, F.C.; *Buchanan v. Ferrier*, 1822, 1 S. 322 (N.E. 299), is not inconsistent with that view, the estate of the husband in that case being insolvent.

¹⁰ Ersk. i. 6, 41; *Howard's Exr. v. Howard's Curator Bonis*, *supra*, per Lord Pres. Robertson at p. 789; *M'Intyre v. M'Intyre's Trs.*, 1865, 3 M. 1074.

claim is not a privileged one,¹ but it will be sustained unless the husband's estate is clearly insolvent,² and the widow is not bound to postpone it until six months after her husband's death.³ It has been sustained when made fifteen years after the husband's death.⁴ But it does not pass to her representatives if she has herself made no claim.⁵ It will not be held to be renounced by a general acceptance of conventional provisions in lieu of legal rights.⁶ But it is not open to a widow who is entitled to a liferent of the whole residue.⁷

SUBSECTION (2).—*Jus Relictæ*.

1732. At common law a wife is entitled on her husband's death, or divorce for his fault, to one-third of his free moveable estate if he leave lawful children by her or by a former wife, or to one-half if he leave no children. It was long a matter of controversy whether this right is one of division or is a claim of debt,⁸ but the latter is the view now accepted.⁹ The right cannot be defeated by any testamentary deed.¹⁰ It vests *ipso jure* on the husband's death, and falls to be calculated as at that date,¹¹ and the widow is entitled to the interest accrued upon it from the date of death.¹² It transmits to her representatives although confirmation to her husband's estate has not been granted.¹³ The husband must have died domiciled in Scotland, but if he was so domiciled at the date of his death it is immaterial that his domicile was elsewhere at the date of the marriage.¹⁴ Where decree of divorce has been obtained against the husband in Scotland, he cannot by afterwards changing his domicile deprive his wife of her right to *jus relictæ*.¹⁵

1733. A husband is perfectly free to dispose of his estate *inter vivos* in any way he pleases, even if he do so expressly for the purpose of diminishing the fund available for *jus relictæ*.¹⁶ He may defeat his wife's claim by giving away his whole estate during life.¹⁷ But a simulate deed which merely purports to divest the granter and really leaves him in enjoyment of the property may be reduced as in fraud

¹ *Lindsay's Crs. v. His Relict*, 1714, Mor. 11847.

² *Barlass v. Barlass' Trs.*, 1916 S.C. 741.

³ *Harkness v. Graham*, 14 S. 1015, per Lord Corehouse at p. 1020.

⁴ *Palmer v. Sinclair*, 27th June 1811, F.C. ⁵ *Hadaway v. Barker*, 1830, 8 S. 800.

⁶ *Griffiths' Trs. v. Griffiths*, 1912, S.C. 626; *Palmer, supra*; *Rennie v. Walker*, 1800, Mor. voce "Presumption," App. No. 4.

⁷ *De Blonay v. Oswald's Reprs.*, 1863, 1 M. 1147; *Hadaway, supra*.

⁸ See *Tait's Trs. v. Lees*, 1886, 13 R. 1104, per Lord Fraser; *M'Intyre v. M'Intyre's Trs.*, 1865, 3 M. 1074, per Lord Cowan.

⁹ *Nasmyth v. Boyes*, 1899, 1 F. (H.L.) 79, per Lord Watson at p. 81; *Cameron's Trs. v. Maclean*, 1917, S.C. 416.

¹⁰ *Tait's Trs. v. Lees, supra*, per Lord Justice-Clerk at p. 1110.

¹¹ *M'Murray v. M'Murray's Trs.*, 1852, 14 D. 1048; *Russell v. Attorney-General*, 1917, S.C. 28.

¹² *M'Intyre, supra*.

¹³ *Dunduff v. Craigie*, 1612, Mor. 3843; *M'Aulay v. Bell*, 1712, Mor. 3848.

¹⁴ *Lashley v. Hog*, 1804, 4 Pat. 581 at p. 615; *Trevelyan v. Trevelyan*, 1873, 11 M. 516.

¹⁵ *Manderson v. Sutherland*, 1899, 1 F. 281.

¹⁶ *Bell's Prin.*, s. 1584; *Fraser, H. & W. ii.* 1010; *Rowley v. Rowley*, 1917, 1 S.L.T. 16.

¹⁷ *Allan v. Stark (O.H.)*, 1901, 8 S.L.T. 463.

of *jus relictæ*.¹ Where a wife had conveyed her whole estate to trustees by an ante-nuptial trust deed, reserving to herself the power of disposal, the husband was held entitled to *jus relictæ* out of the estate.²

1734. The wife may renounce her rights of *jus relictæ* by an ante-nuptial marriage contract; and though she be a minor it seems that renunciation for a small provision would not be evidence of enorm lesion though the husband died possessed of large moveable estate.³ The right may be discharged *stante matrimonio*. Renunciation or exclusion will not be readily implied, but effect will be given to words which, without expressly naming the right, clearly indicate the intention to renounce or exclude it.⁴

1735. Where it does not appear that a provision in a marriage contract, or in the husband's testamentary writings, was intended to be in full of *jus relictæ*, the widow may take both.⁵ But where there are provisions in several deeds, some of which are said to be in full of *jus relictæ* and others not, the deeds will be read together, and the widow must elect between her legal rights and the conventional provisions.⁶ A settlement disposing of the husband's whole estate of moveables is held to imply an intention that the widow shall not take *jus relictæ*, as there would be no estate out of which it could be paid.⁷ Where the wife has assented to a scheme of division of the husband's estate which is inconsistent with her taking *jus relictæ*, she cannot both approbate and reprobate the deed by claiming both her legal and conventional rights.⁸ So a provision of the liferent of the whole estate accepted by the wife will bar a claim of *jus relictæ*.⁹ But where the deed does not dispose of the whole estate, or the failure of objects brings about intestacy *quoad* some part of the estate, a widow who has not expressly renounced *jus relictæ* may claim her half or third of the estate undisposed of in addition to a liferent, or in face of a declaration that the provisions in the deed are in full satisfaction of legal rights.¹⁰

1736. Where a wife has not renounced her *jus relictæ*, and it is clear that her husband did not intend her to take both it and the conventional or testamentary provisions, she must make an election between the two. Her acceptance of one set of rights or the other may be proved

¹ *Lashley v. Hog*, 1804, 4 Pat. 581; *Millie v. Millie*, 1803, Mor. 8215; *affd.* 1807, 5 Pat. 160; *Buchanan v. Buchanan*, 1876, 3 R. 556; and see an instructive American case, *Walker v. Walker*, 1890, 49 Amer. State Rep. 617.

² *Lyon's Trs. v. Miller*, 1903, 5 F. 1096. ³ *Cooper v. Cooper*, 1888, 15 R. (H.L.) 21.

⁴ *Durrant Stewart's Trs. v. Durrant Stewart*, 1891, 18 R. 1114; *Keith's Trs. v. Keith*, 1857, 19 D. 1040; *Dunlop v. Greenlees' Trs.*, 1865, 3 M. (H.L.) 46; *Edward v. Cheyne*, 1888, 15 R. (H.L.) 33; *Wright's Trs.*, 1897 4 S.L.T. 358.

⁵ *Craigie's Tr. v. Craigie*, 1904, 6 F. 343; *Moss's Trs. v. Moss* (O.H.), 1916, 2 S.L.T. 31.

⁶ *Stewart v. Stephen*, 1832, 11 S. 139.

⁷ *Keith's Trs.*, *supra*; *Caithness' Trs. v. Caithness*, 1877, 4 R. 937; *Edward v. Cheyne*, *supra*.

⁸ *Edward v. Cheyne*, *supra*.

⁹ *Ersk.* iii. 3, 30; *Edward v. Cheyne*, *supra*; *Buntine v. Buntine's Trs.*, 1894, 21 R. 714; *Riddell v. Dalton*, 1781, Mor. 6457.

¹⁰ *Buntine*, *supra*; *Naismith v. Boyes*, 1899, 1 F. (H.L.) 79; *Moon's Trs. v. Moon*, 1899, 2 F. 201; *M'Gregor's Trs. v. Kimbell*, 1911 S.C. 1196.

by facts and circumstances.¹ Where she can shew that she was misled in making her election, or even not fairly informed as to the respective rights, she may reprobate her acceptance and claim to be restored to her former position.² And where matters are entire she may be restored, though her ignorance was not due to any fault or negligence of others.³ Mere delay is no bar to the claim for *jus relictæ* unless the circumstances point to abandonment of the claim.⁴ The claim may be made by the representatives of the wife if she has died before making an election.⁵

1737. Prior to 1924 personal bonds bearing interest though subject to legitim were treated as heritable as between husband and wife, and were therefore not subject to *jus relictæ*. This distinction between legitim and *jus relictæ* has now been removed, and the rules of law which determine what estate belonging to a deceased is subject to claims for legitim are now applicable in determining what estate is subject to the claim for *jus relictæ*.⁶

SUBSECTION (3).—*Terce.*

See *TERCE*.

SUBSECTION (4).—*Intestate Husband's Estate Acts.*

1738. By a statute of 1911⁷ the widow of a man who died intestate and domiciled in Scotland has been given certain rights in her husband's estate similar to those conferred upon English widows by an earlier Act.⁸ Where there is no issue of the husband, and the net value of his estate moveable and heritable does not exceed £500, it shall belong to the widow absolutely.⁹ Where the net value exceeds £500 she is entitled to that sum out of his estate, and is a creditor for that sum with interest at 4 per cent. per annum from the date of death.¹⁰ The charge falls rateably upon the heritable and the moveable estate in proportion to their net values.¹¹ The provision is in addition to *terce* and *jus relictæ*—which are to be calculated as if the residue after deduction of the £500 had been the whole of the husband's estate heritable and moveable.¹² The value of the estate is to be taken as at the date of death of the husband.¹³ The Act does not apply to cases of partial intestacy.¹⁴

1739. An amending Act of 1919¹⁵ prescribed the procedure for enforcing the widow's rights, which is by summary application in the

¹ *Pringle's Exrs.*, 1870, 8 M. 622.

² *Donaldson v. Tainsh's Trs.*, 1886, 13 R. 967; *M'Fadyen v. M'Fadyen's Trs.*, 1882, 10 R. 285; *Stewart v. Bruce's Trs.*, 1898, 25 R. 965.

³ *Dawson's Trs. v. Dawson*, 1896, 23 R. 1006.

⁴ *Robson v. Bywater*, 1870, 8 M. 757, per Lord Deas; *Seath v. Taylor*, 1848, 10 D. 377; *Pringle's Exrs.*, 1870, 8 M. 622.

⁵ *Mackenzie v. Mackenzie's Trs.*, 1873, 11 M. 681; see *Gourlay v. Wright*, 1864, 2 M. 1284.

⁶ Conveyancing (Scotland) Act, 1924 (14 and 15 Geo. V. c. 27), s. 229.

⁷ 1 & 2 Geo. V. c. 10.

⁸ 53 & 54 Vict. c. 29.

⁹ 1911 Act, s. 1.

¹⁰ *Ibid.*, s. 2.

¹¹ *Ibid.*, s. 3.

¹² *Ibid.*, s. 4.

¹³ *In re Heath*, [1907] 2 Ch. 270.

¹⁴ 9 Geo. V. c. 9.

¹⁵ *Taylor's Exr. v. Taylor*, 1918, S.C. 207.

Sheriff Court of the county in which the husband was domiciled, or if that is uncertain in the Sheriff Court at Edinburgh. The form of application is set forth in the schedule to the Act.¹ The defenders called are the heir at law, if there is heritable estate, and the heirs *in mobilibus* if there are moveables. If the estate does not exceed £500 the Sheriff pronounces decree of declarator that the whole estate belongs to the widow. This decree is a warrant for confirmation of the widow as executrix dative *qua* relict, and an extract of the decree containing a description of the heritable estate and of the heritable securities and the subjects contained therein may be recorded in the Register of Sasines, and the widow is then held to be duly infeft in her own right in the heritable estate and securities.² Where the Sheriff finds the value of the estate to be more than £500 he grants decree for that sum to the widow against the defenders. The widow can then recover the sum and interest from the husband's executor on the expiry of six months from the husband's death out of the free moveable estate in his hands after deduction of debts. An extract of the decree containing a description of the heritable estate when recorded in the Register of Sasines takes effect as a bond and disposition in security over the estate, postponed to all debts and obligations of the husband.³ The Sheriff is final upon the question of the domicile of the intestate for the purposes of his jurisdiction under the Acts.⁴

SUBSECTION (5).—*Rights on Divorce.*

See DIVORCE.

SUBSECTION (6).—*Rights on Decree of Nullity of Marriage.*

See MARRIAGE.

SECTION 9.—LIABILITIES OF WIFE.

SUBSECTION (1).—*For Ante-Nuptial Debts.*

1740. At common law a wife was exempt from personal diligence, and was not personally liable for her ante-nuptial debts. The protection fell with the marriage.⁵ If a wife had estate from which the *jus mariti* had been excluded this was liable for her ante-nuptial debts, and a creditor might point her moveables or adjudge her heritage.⁶ The husband even when liable for such debts was not the proper debtor, and might require that the wife's estate be first discussed.⁷ And if he paid such debts he was entitled to relief against her separate estate.⁸

¹ 1919 Act, s. 1.

² *Ibid.*, s. 3 (1).

³ *Ibid.*, s. 3 (2).

⁴ *Ibid.*, s. 3 (3).

⁵ See para. 1687 *supra*.

⁶ Ersk. i. 6, 17; Fraser, H. & W. i. 602; *Earl of Leven v. Montgomery*, 1683, Mor. 5876, 5803, 3217.

⁷ Stair, i. 4, 17, 7; Ersk., Fraser, *loc. cit.*; *Earl of Leven, supra*; *Wilkie v. Stewart*, 1678, Mor. 5876.

⁸ *Earl of Leven, supra*; and see para. 1687, *supra*, note 7.

Now that the incapacity of a wife to contract personal obligations has been entirely removed¹ it would seem to follow that her immunity from personal diligence has also disappeared, and that her obligations may now be enforced against her exactly as if she were unmarried.²

SUBSECTION (2).—*For Expenses of Home and Aliment of Husband and Children.*

1741. Where the husband is not indigent it is thought that there is no liability upon a wife with separate estate to contribute towards the expenses of the household.³ No such liability could exist at common law apart from contract, and none such was imposed by the Married Women's Property Acts. Under the Act of 1920 a wife was for the first time made liable "if she has separate estate or a separate income more than reasonably sufficient for her own maintenance to provide her husband, in the event of his being unable to maintain himself, with such maintenance as he would in similar circumstances be bound to provide for her."⁴ The Act contains no provision with regard to the support of children or of a husband who is not indigent. A wife is bound to aliment the children of the marriage after her husband's death.⁵ It has never been decided that she is bound to contribute to their aliment during her husband's lifetime if he is unable to do so. Bankton expresses the opinion that she is bound to contribute proportionally to her means, and that she is liable in default of the husband.⁶ It is thought that a wife must maintain her children if she is able and the husband is unable to do so, subject to any claim of relief against him.⁷ If she contributes to the household expenses out of her income or even out of capital she does not thereby constitute her husband her debtor for sums so expended.⁸

SUBSECTION (3).—*For Delicts and Quasi-Delicts.*

1742. At common law a married woman is responsible for her own delicts and quasi-delicts, and may be imprisoned or fined or found liable in damages.⁹ So a husband is not liable in damages for his wife's slander.¹⁰ He cannot competently sue her for slander.¹¹ *Stante matrimonio* a fine imposed upon a married woman could not formerly be exacted if she had no separate estate exempt from the *jus mariti*, and a wife could not during marriage be imprisoned for failure to pay a

¹ 10 & 11 Geo. V. c. 64, ss. 1, 2, 3.

² See argument in *Churnside v. Currie*, 1789, Mor. 6082.

³ See *Dick's Trs. v. Baird* (O.H.), 1909, 1 S.L.T. 101. ⁴ 10 & 11 Geo. V. c. 64, s. 4.

⁵ *Buchan v. Buchan*, 1666, Mor. 411; *Macdonald v. Macdonald*, 1846, 8 D. 830; *Fairgrievies v. Henderson*, 1885, 13 R. 98; *Whyte v. Whyte*, 1901, 3 F. 937.

⁶ Bankt. i. 6, 15.

⁷ Ersk. i. 6, 36; More's Notes to Stair, xxix; Fraser, P. & C., 3rd ed., p. 100.

⁸ *Hedderwick v. Morison*, 1901, 4 F. 163.

⁹ Fraser, H. & W. i. 557; Walton, H. & W., 2nd ed., p. 199.

¹⁰ *Barr v. Neilsons*, 1868, 6 M. 651; *Milne v. Smiths*, 1892, 25 R. 95.

¹¹ *Young v. Young*, 1903, 5 F. 330.

fine imposed for delict.¹ But if the sentence were one partly of corporal punishment and partly of payment of a fine the former was enforceable, although the latter might have to await the dissolution of the marriage.² A wife has now full capacity to contract as if she were unmarried, and is no longer subject to her husband's curatory. There would therefore seem to be no reason why these rules should longer obtain.

SECTION 10.—DONATIONS *inter virum et uxorem*.

See DONATION.

SECTION 11.—MARRIED WOMAN AS VOTER.

See FRANCHISE and ELECTION LAW.

SECTION 12.—CRIME AND EVIDENCE.

1743. A married woman is responsible for her own delicts, and if convicted of a crime inferring imprisonment or penal servitude she may be punished to the same effect as any other criminal. In Scotland there is no presumption of law, as in England, that a crime committed by a married woman in presence of her husband is done under coercion by him.³ But a wife may plead the fact of coercion by her husband as an excuse for petty crimes or in mitigation of punishment.⁴ A wife is not guilty of a crime if she harbours or conceals a husband guilty of crime, and gives no information against him.⁵

1744. At common law a husband and wife are inadmissible as witnesses against one another on a criminal charge.⁶ In 1898 it was first made competent for an accused person to give evidence on his or her own behalf, and at the same time the wife or husband of the accused was made a competent witness for the defence. Except as after-mentioned it is competent to call the wife or husband of the accused on the application of the accused only—and the failure of the accused to lead such evidence is not to be commented on by the prosecution.⁷ But it may be noticed by the judge. Notice must be given in the list of defence witnesses.⁸ Nothing in the Act renders a husband or a wife compellable to disclose any communication made by the other spouse during the marriage. Except in the cases aftermentioned a divorced spouse is still inadmissible as a witness with regard to facts which occurred or communications which were made during the subsistence of the marriage.⁹

¹ Bell's Prin., s. 1613; *Chalmers v. Douglas*, 1790, Mor. 6083; *Fiscal of Lanarkshire v. M'Luckie*, 1796, Hume 204.

² Fraser, H. & W. i. 560.

³ Hume, i. 47.

⁴ *Harris Rosenberg & Alithia Rosenberg*, 1842, 1 Broun, 367; Hume, i. 49.

⁵ Hume, i. 49; Alison, i. 669; *John Hamilton and Mary Hamilton*, 1849, J. Shaw, 149.

⁶ Hume, ii. 349.

⁷ 61 & 62 Vict. c. 36, s. 1.

⁸ *Ibid.*, s. 5.

⁹ See *Monroe v. Twistleton*, 1803, Peak. Ad. Cas. 219; *O'Connor v. Marjoribanks*, 1842, 4 Mann & G. 435.

1745. To the general rule of the common law there were certain exceptions. (1) The testimony of the spouse of the prisoner might be adduced in his favour where there was a *penuria testium*, that is to say, where it was desired to prove a fact so occult that it could not possibly be proved otherwise,¹ e.g. that the husband who was charged with murder had caught his wife in the act of adultery with the man he killed. But the principle was only admitted in exceptional cases. It was not enough that the evidence of the spouse would be valuable to the accused.² (2) Where one spouse was the victim of the other's violence the injured spouse was a competent witness against the other, and might be compelled to give evidence.³ But the Court has refused to extend the principle to cases other than those of personal violence.⁴ In the case of bigamy the law was ultimately settled against the competency of admitting the spouse of the panel.⁵ This has now been altered by statute,⁶ and the wife or husband of the accused may now be called as a witness either for the prosecution or the defence without the consent of the accused. But such evidence although now competent is not compellable.⁷ It was always competent to adduce the spouse in the first marriage as a production for the purpose of identification.⁸

1746. The Criminal Evidence Act, 1888,⁹ provided by s. 4 that the wife or husband of a person charged with an offence under any enactment mentioned in the schedule to the Act may be called as a witness either for the prosecution or the defence without the consent of the person charged. These enactments as altered and added to by subsequent legislation are the Poor Law (Scotland) Act, 1845,¹⁰ the Criminal Law Amendment Act, 1885,¹¹ the Children Act, 1908,¹² the Criminal Law Amendment Act, 1912,¹³ the Children (Employment Abroad) Act, 1913,¹⁴ and the Mental Deficiency and Lunacy (Scotland) Act, 1913.¹⁵ In these cases the spouse is a competent but not a compellable witness.⁷ There are various other statutes under which the spouse of the accused is a competent witness,¹⁶ in some cases compellable and in others not.

¹ *Christie*, 1731, Maclaurin's Crim. Cas. 632.

² *Surtees v. Wotherspoon*, 1872, 10 M. 866, per Lord Pres. Inglis; Hume, ii. 400; Alison, ii. 464.

³ *Will. Commelin*, 1836, 1 Swinton, 291; *Elliot Millar*, 1847, Arkley, 355; Bell's Notes, p. 252; Macdonald, 449.

⁴ *Fegan and Hyde*, 1849, J. Shaw, 261; *Muirhead v. M'Intosh*, 1886, 13 R. (J.) 52; 1 White, 105.

⁵ *Armstrong*, 1844, 2 Broun, 251; *Ann Paterson*, 1860, 3 Irv. 649.

⁶ Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 51), s. 28.

⁷ *R. v. Leach*, [1912] A.C. 305.

⁸ Hume, ii. 349 n.; *Bryce*, 1844, 2 Broun, 119.

⁹ 61 & 62 Vict. c. 36.

¹⁰ 8 & 9 Vict. c. 83, s. 80.

¹¹ 48 & 49 Vict. c. 69.

¹² 8 Edw. VII. c. 67, Part II. and Schedule I.

¹³ 2 & 3 Geo. V. c. 7.

¹⁴ 3 & 4 Geo. V. c. 7, s. 3.

¹⁵ 3 & 4 Geo. V. c. 38, s. 46.

¹⁶ See list in Walton, H. & W., 2nd ed., p. 261.

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